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NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

(PART ONE)

UNFAIR LABOR PRACTICE PROCEEDINGS

June 1989

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This manual relates to unfair labor practice proceedings and is Part One of a three-part casehandling manual system. Part Two relates to representation proceedings and Part Three relates to compliance proceedings.

Purpose of Manual

This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to authority under Section 3(d) of the Act. It is designed only to provide procedural and operational guidance for the Agency's staff in administering the National Labor Relations Act, and is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law. The guides are not General Counsel or Board rulings or directives and are not a form of authority binding on the General Counsel or on the Board.

10010–10030 *Initiation of Cases*

10010 *Objective:* To the end that appropriate action consistent with the Act will eventually be taken, the filing of a charge is a condition precedent to and initiates the investigation of an unfair labor practice.

10012 *Prefiling Assistance*

10012.1 *Determination Whether Situation Is Covered by the Act:* Approached by an individual who believes he/she has a case, complaint, or grievance that is cognizable under the Act, the Board agent should explore the situation to determine initially whether, provided the proffered facts are accurate, the matter is one that is covered by the Act.

10012.2 *Situation Not Covered:* If the situation is clearly not covered by the Act, the Board agent should point out this fact and discourage the filing of a charge. But the individual should be advised that he/she still has the right to file a charge if he/she wishes. In drafting such a charge, the specific conduct about which the individual complains should be used. As in all situations, the individual should be specifically advised of the 6-month statute of limitation set forth in Section 10(b) of the Act.

(If a charge is filed under these circumstances, it should be processed just as any other.)

Even though no charge is filed under such circumstances, a brief memo of the salient facts should be prepared for the regional records.

10012.3 *Report on Inquiries:* Each professional should keep a running record of time spent during the month in rendering prefiling assistance and answering inquiries of public and other Government agencies. Such record is maintained on Form NLRB-4536.

At the conclusion of an interview the professional should enter the date, check the type of inquiry, note the subject of inquiry and name of individual, check the classification of person making inquiry, and note the result of the inquiry. If a charge is filed, the case number should be noted. The time spent should be noted in the last column of the report.

At the end of the month all reports are submitted to the office manager who will compute and enter on the regional staffing report the total time spent by professionals on prefiling assistance.

10012.4 *Situations Covered by the Act:* If an individual seeking prefiling assistance from the Agency relates a state of facts that, if true, indicates that there may have been a violation of the Act, the individual should be advised of the right to execute a charge before a formal affidavit is procured or other steps taken. The individual should be told that our processes are invoked by the filing of a charge.

(This is not to be construed as *requiring* anyone to file a charge before information is given the individual. *Nor is it to be utilized as a device for an unwarranted buildup of "statistics."*)

Upon the filing of such charge, the Region, having procured a docket number, should immediately commence the investigation. Thus, absent extenuating circumstances, the Board agent rendering prefiling assistance, or another Board agent, should take an initial in-depth affidavit at the time the charge is filed in order to provide for expeditious processing of the case. If after the affidavit has been taken, it appears, and the charging party becomes convinced, that further proceedings are not warranted, a withdrawal request may be solicited, received, and processed without service on or notification to other parties. Except where the charge has been filed contrary to the counsel of the Board agent such withdrawals should be rare since the precharge interview should be of sufficient thoroughness to disclose weaknesses in the case to the individual before the charge was docketed. (See sec. 10012.2.) If it appears that the charge needs "correction," a new—not an amended—charge may be substituted.

10012.5 *Information as Contrasted with Advice:* In any case, requests for information may be honored only to the extent that they seek information, as contrasted with advice, concerning rights, obligations, and general contents of the Act. Answers should be succinct, and they must include all reservations that are necessary in a field as fluid as the area covered by the Act. At some point in the conversation the statement should be made that "I cannot, of course, give advice, cannot give opinions, cannot commit the General Counsel or the Board." Extended correspondence should be discouraged and, if advice is persistently sought, resort to non-Board counsel should be suggested. Under no circumstances should specific counsel be recommended.

Regional personnel should not give advisory opinions as to the legality of given conduct or contract clauses.

10012.6 *Assistance in Preparation:* Assistance in the preparation of a charge may be rendered to the filing party to the extent that such assistance involves the furnishing of forms, reasonable clerical/stenographic assistance, and wording of the charge itself.

For information as to contents of charges, see section 10020.

10012.7 *Assistance in Remedying Defects:* If charges or amendments thereto are received in the Regional Office and contain errors on their face (e.g., a charge that uses the wrong numbers of the sections alleged to have been violated or that incorporates supporting affidavits by reference), assistance may be rendered in remedying the defects.

In such cases, docketing may be delayed pending a prompt communication with the charging party. If the 10(b), 6-month period is involved, no delay should be incurred on this account. If the filing party insists that the charge be docketed as is, his/her wishes should be honored.

10014 *Types of Unfair Labor Practice Cases:* A case initiated by the filing of a *charge* (herein referred to generally as a C case) takes the form of:

a. A CA case, alleging violations of one or more subsections of Section 8(a) of the Act by an employer or its agents

b. One of five types of charges against labor organizations or their agents:

   1. A CB case, alleging violations of one or more of subsections 8(b)(1), (2), (3), (5), or (6) of the Act

   2. A CC case, alleging violations of one or more of subsections 8(b)(4)(i) and/or (ii)(A), (B), or (C) of the Act

   3. A CD case, alleging violations of Section 8(b)(4)(i) and/or (ii)(D) of the Act

   4. A CP case, alleging violations of one or more subsections of Section 8(b)(7) of the Act

5. A CG case, alleging violations of Section 8(g) of the Act (NOTE: Health care cases arising under all sections of the Act other than Section 8(g) should be docketed in the same manner as any other case.)

c. A CE case, alleging violations of Section 8(e) of the Act by a labor organization or its agents and/or by an employer or its agents.

10016 . *Who May File:*

Any person or organization may file a charge.

Whenever a charge is filed involving more than one discriminatory discharge, all of which arise out of a related situation, separate charges may be taken on each discharge, but should carry a suffix rather than a new number.

NOTE: The charge should clearly indicate *the party filing it,* as opposed to the representative *who signs it.*

10018 *Where To File:* A *charge* is normally filed, in person or by mail, at the Regional Office in the Region in which the unfair labor practices are alleged to have occurred. If they took place, allegedly, in more than one Region, the charge may be filed in any of such Regions.

A charge may be filed by handing it to a Board agent away from the Regional Office, in which case the date of receipt should be inserted and the Regional Office notified for assignment of a case number and Board agent.

(For filing with the General Counsel see Sec. 102.33 of the Board's Rules and Regulations.)

10020 *What To File:* Forms for filing charges are furnished by the Regional Offices:

NLRB-501	Charge Against Employer (CA)
NLRB-508	Charge Against Labor Organization or its Agent (CB, CC, CD, CG, CP)
NLRB-509	Charge Alleging Unfair Labor Practices Under Section 8(e) of the Act (CE)

Reasonably similar facsimiles are acceptable but their use should be discouraged. The forms are self-explanatory with respect to the information called for. See Section 102.12 of the Rules and Regulations.

A minimum of an original and four copies of a charge should be filed. Also, in the case of a charge where more than one respondent is named, a copy should be filed for each additional charged party.

Where Board personnel assist in preparing charges, wording should be selected that is specific enough to inform charged parties of the alleged violations and that is broad enough to cover related unfair labor practices, if any.

(With respect to filed charges containing patent errors, see sec. 10012.7.)

10020.1 *Allegations in General:* In all C cases, the facts alleged in a charge to constitute the unfair labor practices should be set forth with some specificity but should not contain detailed evidentiary matter.

A charge should not incorporate, by reference, affidavits or other documents submitted in support of the charge. Where discrimination is alleged, all known discriminatees should be named. Where the names of all are not known, the charge should expressly state that the discriminatees include, but are not limited to, those named.

10020.2 *CC or CD Allegations:* CC or CD charges should indicate whether the alleged violation is under Section 8(b)(4)(i) and/or (ii)(A), (B), (C), or (D). Separate CC and CD charges should be filed against each different union respondent and its agents. Allegations that a union has engaged in a *number of* 8(b)(4) incidents, even though they involve a number of secondary employers, should be contained in a single charge.

10020.3 *CE Allegations:* In CE charges, the allegations should specify whether the contract involved is written or implied, the date on which the contract was entered into, and the parties thereto.

10020.4 *CP Allegations:* In CP cases, it is preferable that the charges be specific with respect to the subsection or subsections of Section 8(b)(7) alleged to be violated. However, if the charging party insists on filing a general 8(b)(7) charge without specifying the subsection or subsections violated, the charge should nevertheless be processed.

Following are sample allegations for CP charges:

> On or about ____________________, the above-named labor organization threatened to picket [name of employer], an employer.
>
> \- or -
>
> Since on or about ____________________ the above-named labor organization has caused various persons to picket and has engaged in picketing of [name of employer], an employer, at its premises at ____________________, and at [other locations] with an object to force and require said employer to recognize and bargain with said labor organization, and to force and require the employees of said employer to accept and select such labor organization as their collective-bargaining representative, notwithstanding that such labor organization is not currently certified as the representative of the employer's employees, and

under (A)

> notwithstanding that the employer has in accordance with the Act lawfully recognized another labor organization, to wit: [name of labor organization recognized] of [address], and a question concerning the representation of the employer's employees may not appropriately be raised under Section 9(c) of the Act.

under (B)

> notwithstanding that within the preceding 12 months a valid election under Section 9(c) of the Act has been conducted among the employer's employees.

under (C)

> such picketing has been conducted without a valid petition having been filed under Section 9(c) of the Act within a reasonable time from the commencement of such picketing.

10022 *Assignment of Case:* After a case has been docketed, it is assigned for investigation to a Board agent.

(On attorney assignments, see also sec. 10062.)

Assignments should be made with a view toward the most efficient and the most expeditious handling of cases. Among the factors that should be considered in the assignment of cases are the following:

a. Complexity of the case, relative to the respective skills of Board agents

b. Availability of Board agents, immediate or prospective—state of commitments and travel plans

c. Respective workloads of Board agents

d. Location of alleged unfair labor practices, relative to cases presently assigned respective Board agents

e. Familiarity with case (e.g., because Board agent received charge initially or because he or she has handled prior cases involving same respondent)

f. Regional Office specialization of work

g. The priority nature of the case.

Every effort should be made to assign a case so that a full-scale investigation can be begun immediately by the Board agent to whom the case will be ultimately assigned. Assignment to Board agents present in the office on the day of assignment will assist in the attainment of this goal. Alternatively, preliminary steps should be taken by someone in the office at the time of filing.

A case may be assigned to a Board agent who is out of town, by telephone or telegram, so that he/she may begin investigating immediately or make necessary arrangements for an early investigation.

10024 *Special Notice Intra-agency:*

a. Upon the docketing of any CC, CD, CE, or CP case, expeditious handling is required. See sections 10200–10248 for notification and clearance required by Division of Operations Management for each type of case.

b. If an R case or a UD case is pending before the Board, the filing of any *charge* is to be reported to the Executive Secretary on Form NLRB-511, Notice of Charge Filed, provided:

   1. The charge involves the employees, or some of the employees, involved in the R or UD case, and

   2. The charging party is one who would normally appear on the ballot in the R or UD case, or is the employer, or is the petitioner in the R or UD case.

10024.1 *Repeat Violators; New Charge Filed (Contempt):* When a charge is filed against a respondent named in, or subject to, an outstanding court judgment, the question of possible contempt action should be examined.

If the charge is meritorious and the allegations are arguably encompassed by the provisions of the judgment, the case should be referred to the Contempt Litigation Branch for consideration. (See Compliance Manual, secs. 10509 and 10510.) The Region should not proceed administratively to issue complaint or to settle the case without the authorization of the Contempt Litigation Branch (sec. 10509.4).

10024.2 *Notification of Collateral Court Suits:* Collateral suits in Federal or state courts including bankruptcy actions against or involving the Agency or its personnel are under the supervision of the Assistant General Counsel, Special Litigation (see sec. 11750.1). Often these suits require consultation with the General Counsel and the Board Members in some types of cases, to formulate a uniform Agency position in all the Regions. This is particularly true where request is made that the Board intervene in private litigation or bring a Federal court action to protect its jurisdiction.

Therefore, whenever it becomes known that a request to intervene in private litigation may be made, or a collateral suit against the Agency is contemplated, including bankruptcy actions, telephone the information immediately to the Assistant General Counsel, Special Litigation, Appellate Court Branch (Regions should notify their Assistant General Counsel of these actions). As received, pleadings and papers should be forwarded by the quickest means to: *Office of the General Counsel, National Labor Relations Board, Attn: Assistant General Counsel, Special Litigation, Appellate Court Branch, Division of Enforcement Litigation, Washington, D.C.*

10024.3 *Interim 8(a)(5) Charges:* Where a new 8(a)(5) charge is filed after the Board has issued a general bargaining order with which the employer has not complied, referred to herein as an "interim" charge, alleging unlawful conduct such as the refusal to furnish information, unilateral changes, etc., the following procedures should be followed:

a. Interim 8(a)(5) charges that simply allege a continuation of the refusal to recognize and bargain with the union do not warrant the issuance of a new complaint. As the Board pointed out in *Canton Sign Co.*, 186 NLRB 237 (1970), no useful purpose can be served by an order based on such an interim charge because the employer is already subject to an order to bargain. In these circumstances, enforcement of the Board's previous bargaining order will provide an early and effective remedy for the violations alleged in the interim charges.

b. If the interim charge is meritorious and alleges a violation that would require a remedy beyond the bargaining order in the first case (e.g., furnish information, rescind a unilateral change, make whole employees who suffered a detriment by reason of such change), then a new complaint should issue. However, if the respondent's sole defense to the interim charge allegations is that the Board's decision and order in the first case was erroneous, the Region may suggest to the respondent that litigation of the interim allegations can be avoided by a stipulation. Under such a stipulation, the respondent would agree to remedy the interim violations if the respondent's position is ultimately rejected in the first case. Such a stipulation can be in the form of an informal or a formal settlement agreement, at the discretion of the Region. In the former, the respondent would agree with the Regional Director to take the remedial steps immediately after the court enforces the Board's order in the first case. In the latter, the respondent would agree that a Board order and court judgment providing such remedial relief can be entered immediately after the court enforces the Board's order in the first case. For its part, the Region would agree to dismiss the charges if the Board's position is ultimately rejected in the first case.

10025 *Summary Judgment Cases; Expeditious Processing:* Although special problems may exist warranting exceptions, normally complaints in summary judgment cases should issue within 14 days from the filing of the charge, and Motions for Summary Judgment should be filed within 20 days after issuance of complaint.

10025.1 *Identifying Potential Summary Judgment Cases:* All Board agents, and particularly supervisory personnel assigning or otherwise processing incoming cases, must be alert to recognize potential summary judgment cases and take appropriate steps from the outset to insure that the expedited procedures prescribed in section 10025.2 are met.

10025.2 *Potential Summary Judgment Cases; Procedure:* Once a summary judgment case is identified, and the investigation establishes that the respondent is refusing to recognize and bargain with the charging union in order to test the certification, the complaint should be issued promptly. Since Motions for Summary Judgment follow the same general pattern and require similar attachments, such motions may be drafted prior to receipt of the respondent's answer. Thus, in many cases, a Region should be able to file its Motion for Summary Judgment once the respondent files its answer if the answer does not raise issues requiring a hearing, or further comment in the motion.

10026 *Communications with Parties:* After a copy of the charge together with the initial communication has been served on the parties, and an attorney or other representative has entered an appearance on behalf of a party, copies of all further documents served pursuant to Section 102.111 of the Board's Rules and Regulations, with the exception of subpoenas, will be served on the attorney or representative of record in addition to the party. (But see sec. 10040.6 for designation of agent for exclusive service.) If a party is represented by more than one attorney or representative, service on any one of such persons in addition to the party satisfies the requirements of Section 102.111, but, as a matter of courtesy, an effort should be made to serve all counsel or representatives who have entered an appearance on behalf of the party. (See also sec. 11840.)

Copies should not be marked "courtesy" or otherwise distinguished from the original except as copies.

It should be particularly noted that copies of the following documents and communications should be sent to the party and to the attorney or representative of record:

a. Notices and orders issued in connection with unfair labor practice hearings, representation case hearings, and 10(k) hearings

b. Regional Director's decisions, reports, and supplemental decisions

c. Dismissal letters in unfair labor practice cases and representation cases

d. Letters approving withdrawal requests of unfair labor practice charges or representation petitions

e. Closing compliance letters

f. Consent election agreements and stipulations for certification upon consent election

g. Representation case certifications.

Where arrangements for an election have been agreed to by the parties with full participation by counsel or representative, notices of election should be sent directly to the parties with copies to counsel or representative. By the same token, the letter requesting the *Excelsior* list, which accompanies a copy of the approved consent or stipulated election agreement, may be sent to the employer, copy to counsel or representatives. The *Excelsior* list supplied by the employer should be sent by the Region directly to the petitioning and intervening parties involved.

In addition, copies of correspondence that confirm some previously agreed to arrangement or appointment may be sent to the parties involved.

Compliance communications are also covered by the foregoing instructions. However, after the requirements for compliance have been worked out and the respondent has advised us of its intention to comply, the notices that may be required, whether pursuant to an administrative law judge decision, Board order, court judgment, or settlement agreement, the request for certification of posting, and the instructions concerning details of compliance can be sent directly to the parties with copies to counsel or representatives.

All other communications, both oral and written, should be with or through only the attorney or representative of record. However, whenever an attorney, representative, or party requests that copies of all written communications be sent to the party, or has authorized that a party or person be contacted directly, such request and authorization should be honored.

Where special circumstances might warrant a departure from the foregoing instructions, clearance should be obtained from the Assistant General Counsel before undertaking any direct communication with a party contrary to these instructions.

10030 *Case Filing Docket:* All Regional, Subregional, and Resident Offices will maintain a daily case filing docket in a manner and location readily available for inspection and copying by members of the public.

Entries should be made on Form NLRB-4706, Case Filing Docket, for each case docketed; numerical sequence is not required but a separate sheet should be maintained for each day. Basic entries for each case are the name of the case, location, filing party, and case number.

10040 *Initial Notices and Service*

10040.1 *Acknowledgment of Receipt:* Immediately upon docketing of a charge, a written acknowledgment of the filing, naming the field examiner or attorney assigned, is sent to the charging party. Copies of Forms NLRB-4541, 4701, and 4813 should be enclosed.

(For procedure to be followed with respect to charges filed *and withdrawn* before assignment or service has been effected, see sec. 10012.4.)

10040.2 *Obtaining Facts from Charging Party:* If the charging party has not submitted, at the time of or prior to the filing of the charge, a written account of the facts and circumstances surrounding the matters complained of in the charge (giving details such as dates, names, and places, telling of the account, and attaching whatever statements in support of the allegations that were then available), the initial letter should contain a request that such information be submitted by *return mail.* In statutory priority cases such a request may also be made orally or by telegram; the nature and form of the request should be tailored to fit the urgency of the situation. Where the charging party is an individual, normally, it would be a better practice to arrange for the Board agent to meet with him/her and take the statement.

10040.3 *Initial Letter to Charged Party and Service of Charge:* A letter giving the name of the Board agent to whom the case has been assigned, advising of the right to counsel, and inviting the cooperation of the charged party is sent by the Regional Director to the charged party. Copies of Forms NLRB-4541, 4701, and 4813 should be enclosed.

The letter should specifically request that the charged party submit his/her version of the facts and circumstances that form the basis of the charge.

Except in CD cases, a copy of the charge enclosed with the letter is sent by registered mail, return receipt requested. Where more than one respondent is named, each is served.

In CD cases a copy of the charge is served on *all* parties with "Notice of Charge Filed" (registered mail, return receipt requested) (sec. 10209).

Normally, the initial letter to the employer should request "commerce" information (sec. 11708).

10040.4 *Notification to Other Parties:* In addition to the initial contacts with the charging party and the charged party described above, notification of the filing of the charge and a copy of the charge should be served by registered mail on certain other parties, as the circumstances may require:

For example:

a. Any labor organization alleged to be dominated or assisted in an 8(a)(2) charge

b. Any employer involved in a CC or CD case

c. In an 8(b)(2) case, any employer whom, allegedly, the charged union has been causing or attempting to cause to violate Section 8(a)(3).

And, in addition to charged parties:

a. Any party to a collective-bargaining contract the validity of which is being attacked

b. In a CE case, a party to such a contract should be served even though no charge has been filed against it.

The letter of notification, "tailored" to fit the situation, should request a written account of the pertinent facts and circumstances, as known to the addressee. All parties should be advised of the right to be represented by counsel and sent copies of Forms NLRB-4541, 4701, and 4813.

(To the extent that the identity or interest of any such party may not be known at the time a charge is filed, the notification and service described above should be effected as soon as possible after the identity or interest comes to the attention of the Regional Office.)

10040.5 *Right to Counsel and Notice of Appearance:* The initial letters to the parties should be accompanied by Forms NLRB-4541 and NLRB-4701. Form NLRB-4541 advises participants of the right to be represented by counsel and summarizes the Board's procedures with respect to the charge. Form NLRB-4701, Notice of Appearance, is for the convenience of parties to notify the Agency of the name and address of counsel or other representative on their behalf. The form may be used at any stage of the case.

10040.6 *Designation of Representative as Agent for Service of Documents:* A party may designate the representative who has entered an appearance on his behalf in a Board proceeding as his agent for the exclusive service of all documents with certain limited exceptions.

Form NLRB-4813, enclosed with the initial communication to the party, is the notice that the party must file to make the designation. The notice *must be signed by the party.* In the event the party is a corporation or other form of business entity, the designation must be made by someone in an official capacity capable of binding the party. Regional Office personnel should not solicit execution of the designation.

When the form is filed its terms will control the service thereafter. Only charges, amended charges, and subpoenas, where so directed, will be served on the party. Copies of such documents served on the party subsequent to the initial charge, subpoenas excepted, will also be served on the representative. All other documents and written communications will be served only on the representative designated as agent. When forms are not filed, service will continue to be made in accordance with section 10026.

The designation, once filed, will remain valid until a revocation in writing is filed with the Regional Director. The designation, as well as any subsequent revocation, should be treated as part of the formal file in the same manner as Form NLRB-4701, Notice of Appearance. If the case is no longer under Regional Office control when such a designation or revocation is filed, the Region should immediately notify the Division or Office in Washington in which the case is pending.

10040.7 *Postal Service Cases; Representatives Authorized for Service of Certain Documents:* Postal Service representatives are designated agents of the Postal Service authorized to receive exclusive service of all charges. Service of charges should be made on these agents and constitutes service within the meaning of Section 102.114 of the Rules and Regulations. This designation shall remain valid until a written revocation of it, signed by an appropriate official of the U.S. Postal Service, is filed with the General Counsel.

10050–10064 *Investigation*

10050 *Objective:* The purpose of the investigation is to ascertain, analyze, and apply the relevant facts in order to arrive at the proper disposition of the case. Among the items to be considered in the course of the investigation are the following:

a. Legal correctness of details on face of charge, such as proper identification of parties and applicability of section numbers

b. Jurisdiction of the Board (see secs. 11700–11708)

c. Timeliness of the charge

d. Determination of sources of factual materials

e. Gathering of the relevant facts

f. Legal analysis of available factual materials

g. Resolutions of conflicts in available factual materials.

The above order is used advisedly. In appropriate circumstances matters on this list need not be considered if the charge does not merit further action under earlier named factors. Specifically, invalidity of the charge, on the basis of factual errors on its face, obviates an investigation into the merits; so do lack of jurisdiction and untimeliness.

10051 *Time Goals for Processing Cases:* All unfair labor practice cases, priority C cases, and summary judgment 8(a)(5) cases should be processed in accord with the following time objectives:

A. *Unfair Labor Practice Cases Generally:*

	Stage	*Goal*
1.	From filing of charge to beginning of initial investigation	7 days
2.	From filing of charge to completion of investigation and Regional Office determination	30 days
3.	From Regional Office determination to implementation of the decision (issuance of complaint, withdrawal, settlement/adjustment, dismissal, submission to Advice); including former advice cases where such action must be taken within 15 days after return to the Regional Office	15 days
4.	From issuance of complaint to close of hearing	45 days

B. *Priority C Cases:*

10(l) Cases

	Stage	*Goal*
1.	From filing of charge to C.P.'s submission of evidence	24 hours
2.	From filing of charge to completion of investigation and Regional Office determination	72 hours: Regional determination should immediately follow the completion of the investigation.

3. From filing of charge to filing of 10(l) petition in merit cases	After merit determination, if conduct continues or a resumption is threatened, etc., 10(l) petition should be filed "without further delay."
4. From filing of charge to issuance of complaint in merit cases	5 days after filing of 10(l) petition.

10(j) Cases

Stage	*Goal*
1. From filing of charge and C.P.'s request or sua sponte a Regional Office determination that 10(j) relief is appropriate	Expeditious handling *at all* stages similar to that accorded 10(l) cases. (See G.C. Memo 77-9.)
2. From authorization to filing 10(j)	48 hours (See G.C. Memo 76-63.)

C. *Summary Judgment Cases:*

Stage	*Goal*
1. From filing of charge to complaint	14 days
2. From issuance of complaint to filing of Motion for Summary Judgment with the Board	20 days

10052 *Timeliness of Charge:* As specified in Section 10(b), no complaint is to be issued on matters occurring over 6 months prior to the filing of a charge *and* the service of a copy on the charged party if the charging party has actual or constructive knowledge thereof unless the charging party is in the armed forces. If the charging party does not have actual or constructive knowledge of the unfair labor practice, the period commences to run when the actual or constructive knowledge is obtained. *Don Burgess Construction Corp.*, 227 NLRB 765, 766 (1977). If the individual is in the armed forces, the 6-month period commences on discharge from the service. See Section 10(b) of the Act. The same rule is applied to amendments where the amended allegations differ in substance from the existing allegations. In circumstances where the charging party is attempting to reopen a dismissed case by the filing of an untimely charge, see sections 10122.6 and 10122.7.

As indicated earlier, on receipt of the charge, the Regional Office serves a copy of the charge on all parties named respondent. Especially in cases where time of service is of the essence, the charging party should be informed that, although we routinely notify parties of the filing of a charge, the charging party is responsible for timely and proper service of the charge.

"Filing" means that the charge has been received by the regional director or other Board agent. "Service" on the charged party is effected at the time of the placing of a copy of the charge in the mails or by actual delivery in person.

Where the charge reveals on its face that it is untimely, no investigation of the merits should be made. Where the date of the alleged violation does not appear on the face of the charge, one of the initial objects of investigation should be to determine the date. Where investigation reveals that no unfair labor practice occurred within the 10(b) period, further investigation of the merits is unnecessary.

10053 *Investigative Guidelines:* The General Counsel's Memoranda listed below contain specific instructions pertaining to the handling and investigation of certain types of cases:

Subject	*Memo No.*	*Date*	*Title*
8(a)(1)-*Dairylea*	78–59	9–19–78	Cases arising under *Teamsters Local 338 (Dairylea Cooperative)*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976)
	76–34	9–23–76	*Teamsters Local 338 (Dairylea Cooperative)*, 219 NLRB 656 (1975), Case-handling Procedures
8(a)(1)-Information Cases	79–22	4–9–79	*Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)

Subject	*Memo No.*	*Date*	*Title*
8(a)(1)-No-Solicitation, No-Distribution Cases	79–76	10–5–79	Guidelines for handling no-solicitation, no-distribution rules in health care facilities
	78–49	7–28–78	*Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978)
8(a)(1)-*Weingarten*	80–17	4–2–80	*Weingarten* rights in light of *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979), and *Roadway Express*, 246 NLRB 1127 (1979)
8(a)(5)	75–54	12–8–75	Guidelines to Regions for processing cases under *Trading Port*, 219 NLRB 298 (1975)
8(b)(1)(A)	79–55	7–9–79	Section 8(b)(1)(A) cases involving a union's duty of fair representation
8(b)(4)(A)	74–27	5–3–74	Section 8(b)(4)(A) and Section 8(e) cases involving the building and construction industry
8(b)(4)(D)	73–82	12–3–73	Guidelines for processing 8(b)(4)(D) cases and related 10(l) petitions
	78–33	6–9–78	Revision of G.C. Memo 73–82 concerning CD cases
8(e)	74–27	5–3–74	Section 8(b)(4)(A) and Section 8(e) cases involving the building and construction industry
	79–1	1–9–79	Effect of Board's recent decisions regarding the 8(e) construction industry proviso
8(f)	79–32	4–26–79	Guidelines for handling 8(f) cases
10(j)	76–63	12–23–76	Casehandling procedures in 10(j) cases
10(l)	75–18	4–22–75	Authorization of Regional Directors to process without clearance requests and application for temporary restraining orders in 10(l) proceeding—Guide for Processing
Collyer-Dubo cases	Unnumbered	5–10–73	Arbitration deferral policy under *Collyer*-revised guidelines
	73–52	7–30–73	*Collyer* deferrals of charges filed by individual employees
	77–58	5–25–77	Guidelines for handling *Collyer* cases in light of the Board's decision in *General American Transportation Corp.*, 228 NLRB 808 (1977)
	77–107	11–1–77	Financial hardship as a basis for nondeferral under the *Collyer* policy
	79–36	5–14–79	Procedures for application of the *Dubo* policy to pendency charging
Health Care	74–49	8–20–74	Guidelines for handling unfair labor practice cases arising under the 1974 nonprofit health care amendments to the Act

Subject	*Memo No.*	*Date*	*Title*
OSHA	75–29	6–24–75	Memorandum of Understanding with the Department of Labor concerning cases arising under Section 11(c) of the Occupational Safety and Health Act
	79–4	1–17–79	Memorandum of Understanding with the Department of Labor concerning cases arising under Section 11(c) of OSHA
Railway Labor Act	79–72	8–23–79	Jurisdiction of the National Mediation Board pursuant to Section 201 of the Railway Labor Act
Mine Safety	80–10	2–19–80	Memorandum of Understanding with the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, concerning cases arising under Section 105(c) of the Mine Act
FOIA Guidelines	88–13	10–21–88	Freedom of Information Act

10054 *Scope*

10054.1 *In General:* The investigation serves as the basis for all action eventually taken in a case. It must, therefore, reveal the entire picture including pre-6-month material that might serve as background.

The investigation should adduce facts pertaining to the remedy as well as to the alleged violation. Appropriate documentary evidence and other material relevant to a remedy should be made a part of the Regional Office file and specifically identified concerning its purpose.

Early in case development, the field examiner or attorney should consider and research legal issues anticipated.

10054.2 *Violations of the Act Other Than Those Alleged:* Investigation should be limited to the allegations of the charge, matters relating thereto, and matters bearing on their truth or falsity. In the event the investigation indicates that violations not litigable under the charge may have been committed, the charging party should be given the opportunity to file appropriate amendments; in the absence of amendment, there should be no further investigation of the additional possible violations, unless they bear specifically on the truth or falsity of the allegations contained in the charge.

10054.3 *Violations of Other Federal Statutes:* Clearance with Division of Operations Management is not required before referring to other Federal or state agencies possible violations of other statutes, except the requirement of clearance would continue when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). Similarly, the clearance requirement would continue prior to referral if alleged unethical conduct of attorneys is involved. (See sec. 11754.2(a).)

Persons who bring to the attention of any member of the regional staff evidence of possible violation of other Federal statutes, independent of our processes and not uncovered during the investigation of a case, should be referred to appropriate authorities.

10054.4 *Violations of Titles I–VI of Labor-Management Reporting and Disclosure Act:* Matters brought to the attention of any member of the regional staff that relate to possible violations of Titles I–VI of the Reporting and Disclosure Act should be referred to the nearest area office of the Labor Management Services Administration, U.S. Department of Labor.

Correspondence should be addressed to the area director. Notify the Division of Operations Management of each such referral.

10054.5 *Obstruction of Justice and Perjury Allegations:* Regional Office personnel should be sensitive to acts of obstruction of justice or perjury on the part of individuals involved in Board proceedings. Report immediately any acts of alleged obstruction of justice or perjury to your Assistant General Counsel. Appropriate cases will be referred by the Division of Operations Management to the Department of Justice for its consideration.

10054.6 *Allegations of Professional Misconduct of Attorneys Arising from Practice Before the Board:* Suspected violations of professional responsibilities by attorneys arising from their practice before the Board and in its proceedings should be referred to the Division of Operations Management. Appropriate cases will be referred to the Bar Association of the State in which the attorney has been admitted to practice.

10056 *Investigation of Unfair Labor Practice Cases and the Role of Board Agent:* In the investigation of cases, Board agents must remain completely neutral. As an impartial investigator, care must be taken not to convey a prosecutorial image, particularly when interviewing witnesses of the charged party.

10056.1 *Witnesses of Charging Party:* As soon as possible, the Board agent should arrange to interview witnesses of the charging party.

The initial letter to the charging party has requested an account of what happened. The contact should be made whether or not an answer to the initial letter has been received. If it has not been received, the Board agent at the time of the contact should remind the charging party of this fact and should insist on prompt receipt regardless of the fact that interview arrangements are being made. The burden of having witnesses available at a date that is the earliest available to the Board agent should be placed on the charging party. (But see sec. 10056.3.)

Where the Region has been advised that the charging party is represented by counsel or other representative, the charging party's counsel or representative, on request, should be permitted to be present during the interview of the charging party or any supervisor or agent whose statements or actions would bind the charging party. This policy will normally apply in circumstances where during the interview counsel or other representative does not interfere with, delay, or impede the Board agent's investigation.

The charging party, whether or not represented by counsel or other representative, should be ready to submit proof of the basis of the charges.

In the event the charging party initially delays in the presentation of evidence without good cause, written notice should be sent to the charging party, or to counsel, if represented, requesting presentation of evidence and reminding them of their duty to cooperate in the investigation and/or the submission of a withdrawal request by a certain date with the admonition that if the noted deadline is not met the charge will be dismissed for lack of cooperation. There are situations, e.g., "stalling" charges, where very prompt action will be called for. In appropriate cases and with the supervisor's approval, a "proof deadline" of 72 hours, or less, may be imposed.

See section 10634 regarding prohibitions on permitting the respondent's counsel to question discriminatees in compliance cases concerning their interim earnings and search for work.

10056.2 *Interviews of Witnesses:* Pursuant to the initial arrangements described above, the Board agent should meet with and interview witnesses offered by the charging party.

Wherever possible, the charging party's case, if one exists, should be established through interviews with the charging party and with witnesses offered by the charging party. Suggestions may be made by the charging party with respect to other witnesses or sources of information, but these should be adopted only on a showing of possible advantage therefrom; for example, a suggestion that the Board agent interview a number of named persons, perhaps unfriendly but at least inaccessible to the charging party, should not be undertaken unless the suggestion is fortified by a reasonable explanation of (a) what such persons would say, and (b) how it would be pertinent. It is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.

Where a witness, whether offered by the charging party or the charged party, who is not a representative or an agent of any party to the proceeding is represented by counsel or other representative and the witness requests that counsel or other representative be present during an interview, the interview should be conducted with counsel or other representative present so long as this presence does not delay or hamper the interview. This policy will normally not prevail where counsel or other representative also represents a party to the case unless the Region, in the exercise of its discretion, wishes to proceed with the interview under such circumstances. In the event the Region declines to proceed with the interview of the witness in the presence of counsel or other representative, the witness should be advised that he or she may submit documentary evidence or a statement that, if timely submitted, will be considered.

10056.3 *Interview of Potential Discriminatees Concerning Backpay Evidence:* The process of remedying unfair labor practices begins with the initial investigation of a potentially meritorious unfair labor practice charge. During the initial investigation of a charge, where the case appears to have merit, the Board agent should inquire of each discriminatee concerning his/her interim earnings and search for work and should place this information in the file for use in settlement or compliance efforts (sec. 10269). Further, during the investigation, the Board agent should obtain for the file the address and telephone number of each discriminatee in the case. Potential discriminatees should be advised of their obligation to search for work and to report all interim earnings, inasmuch as a failure to do so may result in a loss or reduction of any backpay to which they might be entitled in the event that their case is found to be meritorious. They should also be advised to keep written records of their search for work and interim earnings. The affidavit of each alleged discriminatee should contain information relevant to the backpay and reinstatement entitlements, such as rate of pay, wage history, current job classification and duties, job history, current shift hours, average hours worked, and, if possible, the name of a coworker similarly situated to the discriminatee prior to the alleged discrimination.

10056.4 *Pertinent Lines of Inquiry Should Be Exhausted:* All promising leads should be followed. It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of *pertinent* inquiry, whether or not they are within the control of, or are suggested by, the charging party. (As indicated earlier, the charging party's burden is limited to that of full cooperation within its means.) In close cooperation with the supervisor, the Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results. Where necessary, the investigative subpoena should be used (*Subpoenas*, secs. 11770–11806). Depositions may not be used in connection with precomplaint investigations (*Depositions*, sec. 10352).

In cases involving postsettlement unfair labor practice allegations, activity prior to a settlement agreement may be considered in assessing a respondent's postsettlement conduct.

10056.5 *Obtaining Evidence from the Charged Party:* Only when the investigation of the charging parties' evidence and pertinent leads *point to a prima facie case* should the charged party be contacted to provide evidence. In such cases the procedures in section 10056.6 should be followed.

Further, when communicating with charged parties to obtain evidence, Board agents should generally describe to representatives of the charged party the nature of the allegations under investigation. With respect to disclosure, Board agents should relate the basic contentions that have been advanced with regard to the various violations alleged. For example, when the charging party's evidence points to a *prima facie* 8(a)(1) violation involving threats of discharge, the Board agent should disclose such information as the general nature of the conduct (e.g., threat of discharge) and the general locale and the identity of the supervisor involved, as well as the date of the conduct. Such disclosure of the general nature of the conduct under investigation may be a decisive factor resulting in the charged party's cooperation in the investigation.

If the case under consideration involves a question of law and fact, the Board agent should also candidly disclose the legal theories that are under consideration and invite the charged party to file a statement of position or memorandum of law in addition to making witnesses available or submitting evidence.

In addition to being more apt to cooperate during the investigation, it has been our experience that charged parties are also more willing to discuss settlement when they are well informed concerning the basis of the allegations of the unlawful conduct and the legal issues that are in dispute. Where, however, in the Region's judgment the possibility of cooperation or settlement is remote, communications with the charged party may be somewhat more circumscribed.

10056.6 *Interviews of Respondent and its Agents:* Every attempt should be made to interview main representatives (corporate officers, international representatives) of the charged party.

Supervisors at all levels in a CA case and union agents in a CB case should also be interviewed if they possess relevant knowledge. If possible, such statements should be reduced to signed affidavits or at least written form.

Where the respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with its investigation of unfair labor practice charges, the charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally apply in circumstances where: (a) the charged party or the latter's counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation. In cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. In those cases in which the witness does not object to the presence of counsel, the appointment for an interview should be made and counsel advised of the date, time, and place of the interview.

It is noted, however, that *former* supervisors, etc., are not agents of the respondent after the supervisory relationship has been severed. Thus, the respondent's counsel does not have the right to be present when a *former* supervisor is interviewed. In this regard, Rule 801(d)(2)(D) of the *Federal Rules of Evidence* states that an admission is "a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, *made during the existence of the relationship.*" (Emphasis supplied.) See *Southern Maryland Hospital*, 288 NLRB No. 56 (Apr. 14, 1988). See also *S.E.C. v. Geon Industries*, 531 F.2d 39 (2d Cir. 1976). Further, section 10056.2 is applicable with respect to the handling of matters when the former supervisor is represented by counsel.

10056.7 *Rank-and-File Employees and Unbiased Third Parties:* All others (rank-and-file employees, union members) known or believed to have knowledge of the facts in question should be interviewed. Unbiased third parties are apt to be the most fruitful sources of information. Questions opened up by investigation of the "defense" case should be pursued even if reinterviews of witnesses are required.

10058.2 *Investigating Authenticity in Remedial Bargaining Order Cases:* In all remedial bargaining order cases, information should be procured from the charging party setting forth the facts and circumstances relating to the solicitation and procurement of cards. This information should identify those persons, such as union agents and organizers, who will be able to authenticate cards and such information should serve as the basis for further investigation by the Region. Thereafter, an affidavit should be obtained from such persons relating to the cards that they can authenticate. Whenever cards cannot be authenticated in this manner, the individual card signers should be contacted and a statement taken from each of them.

10058.3 *Other Means of Investigating Authenticity:* Seeing each card signer may pose a time-consuming investigative problem, particularly in remedial bargaining order cases involving large units. In such circumstances, signature checks against payrolls and W-4 forms or the use of a questionnaire mailed to each card signer might facilitate investigation of the authenticity of cards. Responses to such questionnaires would also identify further areas of regional investigation.

10058.4 *Investigation of Majority Status:* It is also incumbent on the Region to prove that the signers of valid authorization cards constitute a majority of the employees in an appropriate unit. Absent other probative evidence upon which the size of the unit and the ensuing majority status of the union can be based, an appropriate payroll should be secured from the employer. When the employer has refused a Regional Office request to submit a payroll list to facilitate proof of majority status and the Region is of the view that production of such a list is appropriate to facilitate such proof, it shall subpoena such payroll list or other relevant data bearing on the unit issue. If the employer fails to honor such a subpoena, the Region should consider subpoena enforcement proceedings *prior to the the issuance of the complaint.*

10058.5 *Evidence of Forgery:* Whenever investigation as to the authenticity of authorization cards discloses evidence of forgery, Washington should be notified of the situation for the purpose of referral to the Department of Justice for further appropriate action. At the same time, further processing of the case should be suspended pending advice from Washington with respect to further handling of the case.

10059 *Techniques*

10059.1 *In General:* In this area, action must fit circumstances. Precise devices for each case must be adopted pursuant to consultation between Board agent and supervisor. The following are offered as guides.

Two factors are worth noting at the outset. (a) The true facts of a situation are more likely to be ascertained if the investigation is made *promptly,* before there has been sufficient time for loss of memory or for deliberate falsification. (b) Of immense value, where they can be obtained, are the *written positions* of all parties.

Ascertainment of the basic facts is best accomplished by private interviews with persons having knowledge of the circumstances and by examination of pertinent records. For purposes of investigation, *joint* conferences of the parties accomplish very little, although they may have some value in voluntary disposition of cases (see Techniques of Settling, sec. 10128), or another possible exception to this rule may exist in the "technical" 8(a)(5) case where factual issues may be narrowed.

10059.2 *Affidavits or Statements:* The keystone of the investigation is the *affidavit.* Every effort should be made to reduce statements of witnesses, friendly or hostile, to affidavit form. Extreme care should be taken by the Board agent in recording the facts given by witnesses. In no case should the Board agent interview a witness not a representative of a party (secs. 10056.1, 10056.2, 10056.6) in the presence of the party or its counsel without permission of the Regional Director or his/her designee and without ascertaining in private that such nonprivate interview represents the witness' bona fide desire and a sine qua non of his/her testifying. (Otherwise the Board agent could become party to a party's pretrial discovery interrogation where without notice it summons an unwilling or unconsulted witness to the interview site and then coercively surveils and/or listens to his/her conversation and testimony to the Board agent without the witness' meaningful and considered consent.) Copies of an affidavit should be given, on request, to the witness signing any such affidavit; copies of affidavits should not be given to persons other than the respective affiants themselves prior to hearing. (For production of affidavits during the hearing, see sec. 10394.7.)

When efforts to procure a sworn statement have failed, a signed or initialed statement should be sought.

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When efforts to procure a sworn statement have failed, a signed or initialed statement should be sought.

In circumstances where the affiant refused to execute the affidavit under oath, the affiant should be advised of the option to affirm and sign the affidavit. Finally, even though swearing and signing are refused, a "first-person" statement should be prepared as part of a memo outlining the circumstances of the interview, the reasons for the interviewee's refusal to swear and/or sign.

When affidavits or statements have been submitted by non-Board personnel (e.g., by the charging party), the witnesses should be reinterviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials. (See secs. 10056.2 and 10056.6.)

With respect to release of affidavits to counsel or other representatives, affidavits may be released in the following circumstances:

a. When the Region has been officially advised in writing that the charging party or charged party is represented by counsel or other representative, a copy of the client's statement will be provided to the counsel or representative on written request of the client.

b. When a witness, who is not a representative or an agent of any party, provides a written designation of a counsel or other representative who *does not* also represent a party, a copy of the witness' affidavit or statement should be provided to the counsel or representative on written request of the affiant.

Although, as indicated, this policy will normally not prevail in cases when counsel or other representative also represents a party to the case, Regional Directors do have discretion to honor such a request when the Director deems it appropriate. Cf. sec. 10056.2.

10059.3 *Avoid Group Interviews:* Even though a number of witnesses might have knowledge of the same incident, *group interviews* and *mass affidavits* should be avoided. The degree to which concerted questioning may serve to eliminate minor discrepancies is usually outweighed (a) by the "corrective" pull on each participating witness, and (b) by the possibility that any such witness will fail to make an individual contribution that would be offered if interviewed privately.

10059.4 *Achieving Confidence; Site of Interview:* In achieving the confidence of the witness the Board agent must clearly convey that the agent is entirely neutral and merely seeks the truth, and otherwise create an atmosphere conducive to the elimination of fear. The site of the interview should be selected with this in mind; it should be, perhaps, the witness' home, the Board office, or a "neutral" location, if possible. (Where witnesses are interviewed on company premises or at union headquarters, care should be exercised so that the interview will not be used as a pretext for a general employee or membership meeting.) If necessary, sympathetic appreciation of the witness' position should be expressed; an appeal should be made to witness' sense of civic pride; and the individual should be reminded that the laws are made to protect persons like the witness but they are not self-effectuating.

A witness should be told, where appropriate, of the available protection in the form of Section 8(a)(4) and subpoena. A witness should *not* be told that it will never be necessary to testify or that we could provide "protection" under all circumstances. As for the confidential nature of the information, the witness should be told that the information will be used by this Agency (and may be made available to other Government agencies on appropriate request) and this would be its only use unless and until it becomes necessary to produce the evidence at a formal proceeding. At a formal hearing the Agency will continue its policy in open cases of disclosing affidavits, or portions of affidavits, which have been produced during the hearing pursuant to the Board's Rules and Regulations, Section 102.118. Further, the witness should be advised of the Agency's policy concerning disclosure of information pursuant to the provisions of the Freedom of Information Act (see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)), of withholding disclosure of all affidavits, except as previously noted, so long as the case remains in an "open" status. When a case is "closed" the Agency will normally disclose all affidavits obtained from individuals who are not, at the time of disclosure, current employees of an employer involved in the case or in a unit represented by any union involved and/or members of those unions. See G.C. Memo 79-6 issued January 24, 1979.

Specific approaches depend on circumstances. While the witness should immediately be made aware of the Board agent's identity and mission, an informal atmosphere, at least at the outset, is most conducive to instilling confidence. Writing materials should be kept out of sight until needed. Narrative information, only occasionally interrupted by simply framed questions, should be encouraged.

(See Introduction, secs. 11770–11828, Subpoenas.)

10059.5 *Affidavits/Statements Reduced to Writing:* The affidavit or statement should be reduced to writing at an appropriate time during the course of an interview. Now, the witness should understand that the Board agent is memorializing the facts as the witness knows them, and that (if this has not already been done) the witness will be asked to sign and swear to the truth of what is being said. Affidavits or statements should be written in the first person. Although they need not be verbatim, they should, to the degree possible, contain language used by the witness. Opportunity to read and to make (initialed) corrections or additions should be given. Either at the beginning or the end of the dictated statement, the oath should be formally administered.

Any field examiner or attorney may administer an oath or affirmation. Both individuals' right hands upraised, the Board agent should receive an affirmative answer to the question, "Do you solemnly swear/affirm that the statement you [are about to give will be] [have just given] is the truth, the whole truth, and nothing but the truth, so help you God?"

(A typical affidavit opens with "Now comes [name] who, under oath/by affirmation deposes and says:"; contains the witness' address and phone number if any; and concludes with "I have read the above [have had the above read to me], consisting of ______ pages, and, under oath [or affirmation], say to the best of my information or belief it is true." The jurat—"Subscribed and affirmed to/sworn to before me at ____________________ this ______ day of ______,"—is completed and signed in the presence of the witness. In addition to signing the affidavit, the witness should initial each page.)

In view of the fact that the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a motion for summary judgment), the preamble to unfair labor practice affidavits taken by Board agents should contain the following statement regarding confidentiality:

> I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

10059.6 *Translation/Certification of Affidavits Taken in a Foreign Language:* When an affidavit is taken in a foreign language and the Regional Office has it translated into English, the translator should add the following certification at the end of the affidavit:

> I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translation is an accurate translation of the attached [insert name of foreign language that was translated] language original affidavit.

____________________ __________________________________

Date [Type name of translator]

10060 *Credibility:* In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.

On the basis of its investigation, the Regional Office is expected to resolve factual conflicts.

Often a factual conflict arises out of the misunderstanding of the questions or out of the conclusionary nature of the questions asked or the answers given. The repetition of questions in different forms may help to resolve the conflict. Emphasis should be placed on obtaining factual details rather than the opinions and conclusions of the witnesses. Probing into details otherwise deemed to be insubstantial may be called for in order to determine whether there is a propensity for a "careless" handling of detail.

Where a witness has been contradicted on a relevant fact since he/she last gave testimony, he/she should be reinterviewed. And, to the extent further reinterviews of witnesses will help to resolve the issues, they should be undertaken.

Finally, in situations where factual issues are close, it may be appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case).

It should be kept in mind that a witness' appearance and behavior at the time of interview, the existence or nonexistence of discrepancies in irrelevant details, and even the consistency of prior statements or the witness' general reputation are only *indicators*. Nor does an unwillingness to sign or to swear to the truth of a statement have significance except when related to the reasons for the refusal. The best indications of truthfulness lie in the *probabilities* inherent in a given story (as opposed to another story) viewed in the light of the *entire pattern* of available evidence.

In the infrequent case in which (a) applying all relevant principles, the Region is unable to resolve credibility, and (b) the resolution of the conflict *means the difference between dismissal and issuance of complaint*, a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decisions.

10062 *Assignment of Attorney:* A case may be assigned to an attorney, in lieu of or in addition to an examiner, at the very outset of the case where the complexity of the case (e.g., a CC or a CD case), the patency of legal problems at the outset, or the availability of regional personnel indicates it.

Where a field examiner and an attorney are assigned to a case, or whenever two or more Board agents are assigned to a case or task, responsibility for progress should be specifically fixed by the assigning supervisor or supervisors. In the absence of notice to the contrary, responsibility for progress of a case assigned at its filing to a field examiner shall reside in the examiner until the responsibility is specifically shifted.

While an attorney is assigned to a case but is not responsible for progress, an attorney is the legal advisor and chief legal consultant and will, when necessary, interview witnesses or conduct other required investigation. While the field examiner is assigned to a case but is not responsible for progress, the field examiner will be available for any necessary investigative steps.

10064 *Amendments to Charge*

10064.1 *Preparation:* A charge is amended by typing "Amended" (or "Second Amended," "Third Amended") before the word "Charge" in the regular charge form and by rewriting the contents of the charge to include the desired changes. An amendment merely referring to the existing charge and stating what is being added to or dropped from that charge is proper, but it is better form to repeat all allegations as amended.

10064.2 *Service of Copies:* Whenever amended charges are filed, copies are served by registered mail on the charged and other interested parties for whom service is necessary. Proof of service should be placed in the file.

10064.3 *Assistance in Connection with:* The charging party, on his/her own initiative and irrespective of developments in the pending investigation, may add to or subtract from his/her original, or last amended, charge. Assistance to the extent permitted in connection with original charges may be rendered in connection with the filing of such amendments.

10064.4 *Where Filed after Dismissal:* An amendment filed after dismissal of a charge should be docketed as a new charge, no matter how titled, and assigned a new number.

10064.5 *Where ULP not Specified in Charge Uncovered:* In cases where investigation uncovers unfair labor practices not specified in a charge, regional personnel responsible for the handling of a given case must determine whether the charge is broad enough to support complaint allegations covering the apparent unfair labor practices found.

If the allegations of the charge are too narrow, the charging party (or attorney of record) should be apprised of the deficiency in the existing charge and should be informed that it can be remedied by amendment. Should amendment not be filed, the case should be reappraised in this light, and the complaint issued, if any, should cover only matters *related* to the specifications of the charge.

The scope of the charge may be great enough to cover the practices found, but if, on the other hand, this is questionable, the Region should notify the charging party (or attorney of record) of the facts and of the potential deficiency. Here again, the charging party should be informed that he/she may remedy the situation by amendment. Absent amendment, the case must be reappraised and the eventual complaint, if any, should cover only matters supported by the allegations of the charge.

Where appropriate, when a charging party (or attorney of record) is advised that amendment of a charge is desirable, he/she should be apprised of the effect of the suggested amendment as well as the effect of failure to amend and he/she should also be advised specifically that, in the event he/she declines to file an amended charge, the Board will proceed to process the meritorious allegations of the charge.

(Where the investigation discloses that an unnamed party has committed or has participated in the commission of companion unfair labor practices, the charging party should be apprised of his/her rights under the Act. For example, if the investigation of a CA case discloses the existence of "companion respondents" or the existence of a companion CB case, or vice versa, the charging party should be so informed.)

10064.6 *Where Other Parties May be Liable for Remedying Alleged Unfair Labor Practices:* When the investigation discloses that an unnamed party, such as an alter ego, successor, or individual, or trustee in bankruptcy, may be derivatively liable for remedying the alleged unfair labor practices, the amendment of the charge should be sought to reflect the party as derivatively liable. (See secs. 10058, 10505, 10528.16, and 10643).

10064.7 *Where Unlawful Union-Security Clause Disclosed:* Where the investigation of a charge alleging a discriminatory discharge or refusal to hire discloses the existence of an unlawful union-security clause *in a contract*, by virtue of its terms, the clause should be attacked even though the charging party will not amend and even though the matters specifically alleged lack merit, provided that the allegations of the charge are sufficiently broad to cover the allegations of a complaint attacking the clause. Where, on the other hand, an apparently unlawful union-security *practice* is found in such a case, the charging party (or attorney of record) should be informed of this fact; if the party refuses to amend, the charge should be withdrawn or dismissed.

10064.8 *Amend to Correct Names, Drop Allegations, Cover Related Violations:* Amendments should be sought to correct errors in names of parties as revealed by the investigation. Also, when investigation indicates that allegations of a charge are without merit, an amendment *dropping* the allegations in question should be solicited; but this should not normally be done until the Region is ready to issue a complaint or to dismiss the allegation in question. Finally, amendments should be requested to cover related violations occurring within each 6-month period subsequent to the last amendment.

(With respect to amending charges after a regional decision to issue a complaint, see sec. 10256.)

10100–10116 *Regional Decision*

10100 *Generally:* On completion of the investigation and the necessary legal analysis, a written or oral report should be submitted to the Regional Director who has the final authority and responsibility to reach a decision at the regional level. The Regional Director's final decision is reflected in the dismissal letter, complaint, or other document served on the parties.

On recommendation of the supervisor, or on their own volition, Regional Directors may decide that a case requires full legal research, in which event they may request same. Regional Directors may also decide to hold a meeting or agenda to discuss the issues with members of the regional supervisory staff such as the regional attorney, assistant to the Regional Director, and the supervisor assigned to the case, in addition to the Board agent who conducted the investigation and completed the legal analysis. It is expected, however, that the proportion of cases requiring separate legal opinion or full presentation and discussion at an agenda meeting will be small. The Regional Directors may also utilize subpanels consisting of the Board agent responsible for the investigation and designated members of the supervisory and managerial staff to initially discuss and review certain cases, especially where controlling precedent is clear, to assist him/her in reaching a final decision in such cases.

When the Regional Director determines that a meeting or agenda is appropriate or necessary, the meeting should be held as soon as possible. Except in emergencies, sufficient time should be given to permit the preparation of any necessary reports and analyses of the nature described in sections 10104–10108, and the reading or rereading of such reports and analyses, if in writing, by all participants in advance of the meeting.

The advance reading should eliminate the necessity of a repetition of the facts at the meeting or agenda. The examiner and the attorney responsible for the investigation or legal analysis should be prepared to answer any questions raised. Each person present should fully express his/her views and recommendations. The extent of consideration to be given each case will, of course, vary with its complexity.

On conclusion of the meeting, the Board agent assigned to the case should prepare as promptly as possible a brief memorandum of the discussion that concisely summarizes the meeting and crystallizes the principal issues.

The memorandum should be reviewed by the Board agent's supervisor, and may be circulated to other participants to assure its accuracy. It should then be submitted to the Regional Director to provide a written summary for consideration and evaluation of the relevant facts, arguments advanced, and views expressed by participants, the applicable law and, if appropriate, recommendations as to the remedial relief to be sought. The memorandum may be utilized by the Regional Director in reaching the ultimate determination that is reflected in the dismissal letter, complaint, or other dispositive action taken in the case. However, the Regional Director is not limited by the memorandum and may, where it is deemed appropriate, base this ultimate determination on other or additional grounds.

10102 *Recommended Withdrawals; Approvals:* On receipt of a withdrawal request (whether solicited or not), the Board agent responsible for the progress of the case must make a written or oral report, including a recommendation therein. The report shall include adequate reasons in support of the recommendation.

On receipt of the report, the Regional Director will take appropriate action.

10104 *Recommended Dismissals:* Oral or written reports recommending against formal action, whether based on lack of merit, the promise of certain remedial action by the charged party ("unilateral" settlement agreements), or any other reason, should, as in other cases described above, be prepared by the Board agent responsible for progress of the case. The report should be somewhat more detailed than that involving a withdrawal or an all-party settlement agreement (if it involves a "unilateral" settlement agreement, for example, it should treat with the objections of the charging party to approval of the agreement), but it should be concise. A recital of efforts to procure a withdrawal request should be included.

After review by the supervisor, the report is submitted through appropriate channels for review and recommendations to the Regional Director. The case may be referred to an agenda presentation for further discussion and analysis, as described in section 10100.

106 *Recommended Settlement Agreements:* Where all parties ve entered into an agreement in settlement of a charge, the Board ent responsible for progress of the case will make a written or oral port and recommendation thereon. The report shall be concise, conning only the basic essentials. If the proposed settlement falls short of ull remedy, the deviation should be explained.

e agreement and report are transmitted through the supervisor for view. Here also the Regional Director may consult with the regional orney, assistant to the Regional Director, and members of the supervory staff.

r a detailed discussion of the settlement of cases, see sections 10124–174.

r "unilateral" settlement agreements (i.e., those in which the charg- party has not acquiesced), see section 10134.2.

108 *Recommended Complaints:* A written or oral report commending issuance of complaint should be prepared by the Board ent responsible for progress of the case.

e report whether written or oral should give the basic elements of case, including the following:

a. Jurisdiction (details unnecessary; refer to file memos)

b. Labor relations history (relevant highlights only)

c. Factual chronology (sufficient facts should be set out so as to enable a regional determination. Credibility considerations with reasonings should be noted).

d. Conclusions and recommendations (with reasons)

e. Settlement efforts, if any

f. Discussion of the appropriate remedy.

enever necessary there will be a legal analysis.

The legal analysis should be concise; reference to the factual report will lead to an economy of wordage. But it should treat the legal adequacy of the facts, the legal principles involved, and the anticipated trial problems.

As in situations where dismissal is recommended, complaint recommendations may also be referred to an agenda for further discussion and analysis. (See sec. 10100.)

10110 *Other Recommended Action:* Regional office decision may be that advice of Washington be sought or that enforcement, backpay, or contempt proceedings be instituted.

A case falling within this item may be referred to a regional committee meeting at the option of the Regional Director.

10112 *Regional Committee Meetings:* The regional committee may consist of the Regional Director, assistant to the Regional Director, the regional attorney, assistant regional attorney, the examiner and/or attorney assigned to the matter under consideration, and the supervisor(s).

When it has been determined that a regional committee meeting is necessary, the meeting should be held as soon as possible. Except in emergencies, sufficient time should be given to permit the preparation of reports and analyses of the nature described in sections 10102–10110, and the reading or rereading of such reports and analyses, if in writing, by all parties in advance of the meeting.

The advance reading should eliminate the necessity of a repetition of the facts at the regional committee meeting. The examiner and the attorney should be prepared to answer any questions raised. Each person present should fully express his views and recommendations. The extent of consideration to be given each case will, of course, vary with its complexity.

A minute of the committee discussion and action should be prepared promptly by the participating attorney unless contrary instructions be given in a case. It should be as concise as possible, referring where necessary to the report and legal analysis. On completion, it may be circulated among the committee members and initialed by each of them. When it is concluded that complaint should issue, absent settlement, the agenda minute should reflect the fact that full consideration was also given to the remedy best suited to the facts of the particular case.

10114 *Regional Determination:* On the basis of the matters brought out in the report and/or analysis, or at any meeting or agenda, he regional Director makes a decision. The responsibility for action aken at the Regional level is the Regional Director's.

0116 *Limitations on Regional Action:* See submission to the Division of Advice or to the Division of Operations Management iscussed in sections 11750–11756. Also, certain other manual sections equire submissions in specific situations.

A reasonable period for submission of a withdrawal should be given before dismissal action is taken. If the withdrawal request is received, the report and recommendation thereon should contain the reasons for soliciting the request.

10120.4 *Positions of Other Parties:* Except in certain CP cases (sec. 10120.2), when a withdrawal request has been received, it is unnecessary to ascertain the positions of other parties to the matter unless it appears that such parties will be adversely affected by approval of the request. Likewise, a withdrawal request will be honored unless such disposition will result in a distortion of the purposes of the Act to the detriment of persons other than the charging party. For example, a withdrawal request may not be honored if such disposition will result in a distortion of the purposes of the Act to the detriment of persons such as alleged discriminatees other than the charging party. Further, in determining whether to approve a withdrawal request, appropriate consideration should be given to whether authorization of the withdrawal is inconsistent with Agency settlement practices and policies or otherwise interferes with the effectuation of the Act or its purposes.

10120.5 *Refiling of Same Allegation:* A closing of a C case pursuant to a withdrawal request constitutes a disposition of the issues *without prejudice*. However, the 10(b) period will apply with respect to any refiling of the same allegations. The matter, if reopened, should be considered and handled as a new charge.

10120.6 *Withdrawal Request after Dismissal:* If a withdrawal request is received *after* the charge has been dismissed but *during* the 14-day (or 7-day) period for appeal of the dismissal and if good cause exists for approving the withdrawal request had it been filed prior to the dismissal, the dismissal should be *revoked* and the withdrawal request should be put in effect. (See Rules, Secs. 102.19 and 102.81.)

If a withdrawal request is received while the case is pending on appeal, the Regional Director should immediately notify the Office of Appeals before he issues his letter revoking the dismissal and approving the withdrawal.

10120.7 *Notification to Parties:* On approval of a withdrawal request, the Regional Director should notify all parties that the charge, with his/her approval, has been withdrawn. No reasons for the withdrawal or the approval should be given in the notification.

10122 *Dismissal:* (See sec. 11751 for cases that should be submitted to Washington before dismissing a charge.)

10122.1 *Generally:* Strictly speaking, an unfair labor practice is "dismissed" (except in certain CD cases) when the Regional Director, on behalf of the General Counsel, refuses to institute formal proceedings (issue a complaint). (For CD charges see secs. 10208–10214.) Thus, a case should be dismissed in the absence of ground for formal proceedings.

10122.2 *Basis for Dismissal:* Dismissals should be based on specific grounds such as the following:

a. Legal insufficiency of details on the face of the charge

b. Lack of cooperation by charging party

c. It does not appear that the Board would assert jurisdiction under its existing standards

d. Lateness of the filing of the charge (10(b))

e. Lack of sufficient evidence

f. Formal proceedings will not effectuate the purposes of the Act (covers isolatedness, policy determinations)

g. "Unilateral" settlement agreement effectuating purposes of the Act.

10122.3 *Notification:* The charging party (having first been given an opportunity to withdraw) should be notified by certified mail of the dismissal. The dismissal letter should contain a summary report of reasons for refusing to issue complaint unless the charging party has specifically rejected the summary (sec. 10120.3). Where summary report has been rejected, see sec. 10122.2 for brief statement of appropriate reason.

The names and addresses of all interested parties and counsel, who have entered appearances on their behalf during the investigation, should be listed on the dismissal letter, and copies mailed to such persons at the same time the original letter is mailed to the charging party.

NOTE: The summary must provide the type of detailed explanation that will permit the charging party, if the individual should desire, to direct an appeal to the dispositive aspects of the dismissal. Dismissal letters should not issue with only a statement of the ultimate conclusions as the stated reasons for dismissal, but rather should provide the parties with the details of the intermediate propositions of law and fact on which the Region has relied to support the ultimate conclusions. For example:

a. The particular reason for a deficiency should be stated.

b. The material element of the charge that was found unsupported should be particularized.

c. When there are alternatives or multiple bases for disposition, they should all be listed.

10122.4 *Appeal Rights:* The dismissal letter (sec. 10122.8) must instruct how an appeal may be filed with the General Counsel. Normally, the charging party is given 14 days (see Rules, Sec. 102.19) in which to file an appeal. However, the charging party is given only 7 days (see Rules, Sec. 102.81) in which to file an appeal when an 8(b)(7) charge is dismissed and an expedited election directed; or, when a charge alleging violations of sections of the Act other than 8(b)(7), but which are related to an 8(b)(7) proceeding, is dismissed. (See sec. 11840.4 for computation of time periods.) Form NLRB-4938, Procedure for Filing an Appeal, should be enclosed with dismissal letter.

The dismissal letter also requests that, if an appeal is filed, the person doing so use the Notice of Appeal forms—sufficient copies of which are enclosed with the dismissal letter—to advise the other parties that such an action has been taken. (See Rules, Sec. 102.19.)

Under Section 102.19 of the Board's Rules and Regulations, copies of the General Counsel's acknowledgment of the filing of a C-case appeal will be served on all parties. Copies of any ruling on a request for extension of time to file an appeal will also be served on all parties.

10122.5 *Partial Dismissal:* Where the Region finds only a portion of the charge to have merit, the remaining nonmeritorious allegations may be dismissed. In such case the dismissal letter should make it clear that the meritorious allegations are not dismissed and that, as to the portion of the charge dismissed, the usual opportunity to file an appeal is afforded.

a. Complaint may issue as to the meritorious allegations, but if the partial dismissal is appealed hearing should not be held until after disposition of the appeal.

b. If a settlement agreement as to the meritorious allegations is entered into, approval thereof should be withheld until after the expiration of the time for filing an appeal from the dismissal, or until after the disposition of an appeal.

In cases involving closely related cross-filings (e.g., 8(a)(5)-8(b)(3) or 8(b)(7)-8(a)(5) situations), where the Region finds merit to one of the charges but dismisses the other, the issuance of complaint should be withheld, unless otherwise instructed by Washington, until after the expiration of the time for filing an appeal, or until after disposition of an appeal.

NOTE: In each of the foregoing situations, the Office of Appeals should be notified of the pending settlement or complaint so that the appeal may be expedited.

10122.6 *Reopening of Issues:* The General Counsel has authority to reopen a case by virtue of the discretion vested in him by Section 3(d) of the Act under certain circumstances. In such cases, the 10(b) period is tolled as of the date the charge was filed rather than the date of its reinstatement. After a timely filed charge has been dismissed or withdrawn as a result of Board agent solicitation, it may be reinstated after the expiration of the 10(b) period under certain circumstances. In appropriate cases, this authority can be exercised not only by the General Counsel but also by the Regional Director acting as his agent. Thus, the Regional Director has the authority, in appropriate cases, to revoke a dismissal or approval of a solicited withdrawal, and reopen the case for reconsideration and issue complaint more than 6 months after the alleged unfair labor practice has occurred, in the following circumstances:

a. Where evidence is newly discovered (*California Pacific Signs,* 233 NLRB 450 (1977))

b. Where an error was made in an initial failure to assert jurisdiction (*Airport Connection,* 243 NLRB 1076 (1979)).

(It is expected that a new charge containing the same allegations as those in the charge previously dismissed or withdrawn and unaccompanied by sufficient valid grounds for proceeding will be summarily dismissed.)

10122.7 *Revocation of Dismissal or Solicited Withdrawal:* In all cases where the charging party's appeal has been denied and the Region believes that a revocation of the dismissal is appropriate, the Region must obtain clearance from the Office of Appeals in order to revoke the dismissal. (It is expected that reinstatement of the charge in those cases where the appeal has been denied would be rare and would never be authorized to permit withdrawal of the charge.) Where an appeal is pending, revocation shall be preceded by telephonic notification by the Region to the Office of Appeals of the intent to revoke the dismissal.

In all cases other than those listed in section 10122.6a and b, the Region must obtain authorization from the Division of Advice if reinstatement of the charge would occur more than 6 months after the occurrence of the underlying unfair labor practice. Where no appeal has been denied and reinstatement of the charge occurs within 6 months after the occurrence of the underlying unfair labor practice, the Regional Director may revoke the dismissal or solicited withdrawal without obtaining clearance from the General Counsel's office.

10122.8 *Pattern 1:* Pattern for dismissal of charge in CA, CB, CC, CD, or CE case. Charging party is given 14 days (see Rules, Sec. 102.19) in which to file an appeal *except when C case is directly related to an 8(b)(7) proceeding.* In such case the charging party is given 7 days (see Rules, Sec. 102.81) in which to file an appeal. (See sec. 11840.4 or Sec. 102.114 of Rules and Regulations for computing time periods.)

If the charging party *has rejected* the summary report, see section 10122.2 for concise statement of basis for dismissal.

[Charging Party]

Re: [Case name]
[Case Number]

Gentlemen:

Dear [name]:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted inasmuch as

[Statement of reason for dismissal]

I am, therefore, refusing to issue [reissue] a complaint in this matter.

[In CD cases only, the following language should be substituted for the last sentence of the above paragraph: I am, therefore, declining to issue notice of hearing as provided in Section 10(k) of the Act and I am refusing to issue complaint in this matter.]

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons on which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on [month-day-year]. On good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

__________, Regional Director

cc: Respondent
Other parties
General Counsel
[If related to 8(b)(7) charge, copy to other interested labor organization(s).]

10122.9 *Pattern for Revocation of Dismissal:*

[Charging Party]

Re: [Case name]
[Case number]

Gentlemen:

On [date] I declined to issue complaint in this matter alleging ____________________.

On [date] an appeal of my action was filed by ____________________.

Since ____________________ I have reconsidered my action in declining to issue a complaint in this matter alleging ____________________ and accordingly, on behalf of the General Counsel, this is to inform you that the matter is deemed to be remanded to the undersigned for further processing, and I hereby revoke the action reflected in my letter of [date].

[An opportunity to settle in absence of complaint can be set forth here.]

Very truly yours,

____________, Regional Director

cc: Other parties
General Counsel

10122.10 *Extension of Time to File Appeal:* Immediately on receipt of a copy of request for extension of time to file an appeal, the Regional Director should advise Office of Appeals whether there is any objection to granting the request, and, if so, the reason therefor. Also, advise in detail if there are any concurrent or other cases that might be affected by the granting of the request.

NOTE: If charge is partially dismissed, see section 10122.5 for permissible action during appeal period or while appeal is pending.

10122.11 *Appeals (Requests for Review):* The Regional Office file should be transmitted to Office of Appeals as soon as possible after receipt of appeal. In the event that the Regional Office file cannot be submitted within 3 days from the date of receipt by the Region of an appeal, a memo should be forwarded to Office of Appeals explaining the reason for the delay and the estimated date of submission.

The transmittal memo with the file, or the memo explaining reasons for the delay, should indicate whether there are any other cases (or part of the same case) pending involving the same respondent, by case number and date filed, and should make note of the current status of all related cases. Sufficient detail should be included to indicate whether priority consideration should be given the appeal because of such cases, particularly if a related case is pending an early hearing. If, after transmittal of the aforementioned memo, a new case is filed involving the same respondent, similar information should be forwarded to Office of Appeals by memo.

In all such cases, it is the responsibility of the Regional Office to notify Office of Appeals of any changes in status during the pendency of the appeal.

Notification should be made by telephone or memorandum, depending on the urgency of the situation, to Office of Appeals.

Preparatory to being submitted to Office of Appeals, the Regional Office file should be examined. Care should be taken to assure that memos and reports are accurate and legible.

Any points raised in connection with the appeal should be given further consideration. In the transmittal memo, the Regional Director should give an appraisal of the points made—unless they have already been fully considered, in which case the Regional Director should simply say so—and should note the present positions of regional personnel who worked on the case. The transmittal memo should also make note of the current status of all related cases.

In order to facilitate the handling of those incoming cases that require expedited processing, the information set forth below, together with the preceding information, should be clearly set forth at the beginning of the transmittal memo or the comment on appeal for any case that involves the following:

a. A pending hearing in any related case (include the date, if any, set for the hearing)

b. An appeal that arose from the partial dismissal of a case in which complaint has been issued

c. Appeals involving unilateral settlement

d. Appeals from a blocking charge

e. Appeals with related matter currently pending before the Board (e.g., a report on objections)

f. Appeals in cases involving active picketing.

During the period in which the file is being reviewed, the Region should transmit to Office of Appeals any new information, developments, or recommendations.

A sustaining of the appeal restores the status of the case as it existed prior to the dismissal. Complaint should be issued, or other appropriate action taken.

10122.12 *Pattern for Approval of Request to Withdraw Appeal from Dismissal and Withdrawal of Charge:*

[Charging Party]

Re: [Case name]
[Case number]

Gentlemen:

On [date] I declined to issue complaint in this matter alleging ________________.

On [date] an appeal of my action was filed by __________________.

On [date] a request to withdraw the charges in this matter was filed by ________________. The latter request is deemed to be a withdrawal of the appeal filed on [date] and a request to withdraw the charges in this matter.

Accordingly, on behalf of the General Counsel, the request to withdraw the appeal is hereby approved and the undersigned Regional Director hereby approves the withdrawal of the charges in this matter.

Very truly yours,

____________, Regional Director

cc: Other parties
General Counsel

10122.13 *Appeals Remanded to Regions for Further Investigation:* All cases remanded to the Regions by the Office of Appeals are to receive priority treatment and such further investigation as may be required shall be conducted immediately. The Region should return all remanded cases to Washington within 7 days after receipt, unless the nature or extent of the further investigation required or the unavailability of essential witnesses prevents prompt resubmission. Where the information requested can be transmitted conveniently by telephone or teletype, this means of communication should be utilized.

In the event the further investigation cannot be completed and the case will not be resubmitted within a 7-day period, the Office of Appeals should be notified of the reason for the delay and given an estimate of the additional time required.

10124–10194 *Settlements*

10124 *Settlements in General*

10124.1 *Policy:* It is the policy of the Board and the office of the General Counsel to provide full opportunity to the parties to reach a mutually satisfactory resolution of issues as an alternative to litigation. Settlement of a meritorious case is the most effective means to improved relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action.

The expenditure of funds in connection with the formal stages of a case and the effect of the passage of time on the effectiveness of the Board in accomplishing the objectives of the Act dictate that the achievement of voluntary remedial action be given high priority and that complete and diligent effort be exerted to achieve the settlement of the greatest possible number of meritorious cases.

NOTE: If charge is partially dismissed, approval of agreement should await expiration of appeal period or disposition of appeal.

10124.2 *Principal Factor in Achieving Settlement:* Experience has clearly demonstrated that, by far, the principal factor affecting a Region's success in achieving settlement is the confidence of the public in the ability and integrity of the Regional Office; when the public is convinced that the Regional Office, when proposing or negotiating settlement, has fully investigated and considered the facts of the case and honestly believes that the formal prosecution of the case would result in the finding of unfair labor practices, the chances of settlement are considerably increased. In this regard, it should be noted that those Regional Offices with a high rate of successful litigation also have a high rate of settlement of meritorious cases.

10124.3 *Scope of Remedy:* Public confidence is also nurtured by the history of the nature and extent of the settlements sought and obtained by the Regional Office. In this connection, it should be noted that the remedy provided for in a settlement must not exceed that which would be expected from a fully favorable Board decision. It should not, for example, require backpay for one who is not entitled to it on the facts of the case. Moreover, adjustment of a charge by settlement is limited to securing compliance with the Act. It may not include provisions on matters in which the Agency has no jurisdiction under the Act. By the same token, a settlement agreement should substantially remedy all unfair labor practices committed. Any proposal of less than a substantial remedy must be affirmatively related to the special factors or demands of the particular case (i.e., by patent trial weaknesses, overall costs, time elements).

10124.4 *Limitations on Regional Authority:* See section 11751.2 where clearance from Division of Operations Management should be sought before approval of settlement agreements.

10126 *Timing of Settlement Attempts*

10126.1 *Initial Steps to Achieve Settlement:* The desirability of voluntary disposition at an early stage in the life of a charge cannot be overemphasized. The process to obtain such voluntary disposition deserves the devotion of sincere effort, and no case can be considered well investigated unless all attempts to settle a meritorious charge at the earliest stage possible have been made. Thus, it is incumbent on the Board agent investigating the case to take the initial steps to achieve settlement. If, at the conclusion of the investigation, the Board agent and his supervisor are convinced that the charge allegations, in whole or in part, have merit, the initial steps to effectuate a proper settlement should be taken by the Board agent. The taking of such action is, of course, subject to whatever restrictions the Regional Director and/or the regional attorney may place on members of the regional investigatory staff. In certain cases in which the charge allegations clearly have merit, the Board agent may take indicated action to settle the matter without expressed clearance through his supervisor. It is the responsibility of the Regional Director to police this type of action and place such restrictions on individual Board agents as may be required (i.e., requiring advanced telephonic authorizations or imposing any other appropriate limitations on the scope of settlement authority possessed by individual Board agents).

When initial approach to achieve settlement, discussed above, precedes regional determination as to the merits of the case, the Board agent, during the initial settlement interview, should make clear to the parties that the proposal of settlement is based on the investigator's conclusions in the matter and that any agreement reached would be subject to the Regional Director's adoption of the investigator's recommendation.

10126.2 *Further Efforts Prior to Complaint:* If settlement efforts prior to regional determination fail, and if it is ultimately determined to issue complaint, further efforts to achieve settlement should be made prior to actual issuance of the complaint. Indeed, experience has indicated that quite often this period has been critical and fruitful in consummating settlements. The investigative agent, in conjunction with his/her supervisor, and the Regional Office settlement coordinator, is directly responsible for making these settlement efforts. Because of the settlement coordinator's relatively long years of experience in regional operations, the stature he/she has achieved through such experience, the settlement coordinator's role in the settling of cases may be likened to that of an "elder statesman" and for this reason would presumably increase the possibility of settlement during the 15-day period between regional determination and issuance of complaint.

Of course, issuance of complaint should not be unreasonably delayed during the 15-day period and, where it is clear from the outset that settlement at this stage will not be achieved, complaint should issue immediately. Conversely, the assistant to the Regional Director should be given a reasonable period of time during the 15-day period to effectuate settlement before complaint issues. Normally, the charged party should feel satisfied that discussions up through the assistant to the Regional Director constitute a full exploration of settlement possibilities and at that time will make a determination whether or not to settle. In certain situations, however, where, for example, there are indications that the charged party feels that his settlement offers have not been fully explored or where the assistant to the Regional Director believes that further settlement efforts may prove fruitful, the assistant to the Regional Director should at this time make known the Regional Director's availability for further settlement negotiations.

10126.3 *Efforts After Complaint:* Settlement efforts should, of course, continue at all appropriate stages of the proceeding. Settlement efforts after complaint should be continued by the attorney assigned to the case. It should be noted that settlement procedures at all stages should continue to be flexible (i.e., if the services of the settlement coordinator or any member of the Regional Office hierarchy would be of value they should be utilized after complaint has issued and even after hearing has opened).

The attorney assigned to try the case, if he/she has not participated in settlement discussions prior to complaint, should review all previous efforts to ascertain whether untried approaches exist that may lead to an agreement.

10128 *Techniques of Settling*

10128.1 *Basic Requirement:* Skill in attaining settlements is gained primarily from experience *and the following discussion of settlement techniques can only serve as guidelines to be followed in settlement negotiations.* There is, however, one basic requirement that is absolutely essential before settlement efforts are commenced, and that is *a complete and thorough knowledge of the case,* both as to the facts and to the law. The Board agent should display confidence where the available facts support his position and indicate that there exists a proper case for disposition by settlement. Although a settlement conference is not a forum for trying a case, a knowledgeable point made or a telling answer given will go a long way toward breaking down the opposition's willingness to test the issues.

10128.2 *Conduct of Board Agent:* Most often it is the reaction of the charged parties to the Board agent's initial approach in the direction of settlement that determines whether or not settlement will be ultimately consummated. For this reason, it is important that the Board agent conduct himself/herself so as to insure the best chances of obtaining a favorable reaction from the charged party to the proposal of a settlement. At all stages of settlement negotiations, particularly during the initial conference with the charged party, the Board agent should conduct himself/herself in an objective and detached manner and thereby convey to the charged party that the Board has no ax to grind in the particular case and that settlement is being offered because

a. It is required by the provision of the Administrative Procedure Act (Sec. 5(b) "Procedure . . . (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit") (5 USC § 554(c)(1)).

b. After full and careful investigation and consideration of the matter the Board agent (or the Regional Director after determination to issue complaint has been made) is convinced that certain unfair labor practices have been committed.

c. Both the Government and parties to the case would save considerable time and expense by voluntary adjustment of the matter.

Once the charged party is convinced of the benefits to be achieved not only by the charged party but also by the Government in the voluntary adjustment of the case, much has been accomplished toward the ultimate settlement of the matter. This is not, however, meant to minimize the effect of the subsequent negotiations of the details of the settlement.

In attempting to adjust a meritorious C case, the Board agent is faced with somewhat of a dilemma:

a. The Board agent must reveal enough to demonstrate that the case can be won but must not disclose enough to endanger the case should settlement negotiations prove fruitless.

b. In no event should the Board agent reveal names of witnesses or other sources of information.

c. In sum, the Board agent should give a general picture of what the latter believes occurred, adding that in his/her own opinion the available evidence will support the picture.

10128.3 *Reservations in Settlement Contacts:* It is important that settlement contacts, even subsequent to regional determination to issue complaint, should be accompanied by certain clearly expressed reservations. It should be made clear (unless, in a regional committee meeting, instructions to the contrary have been given) that the proposed settlement agreement is being recommended by the agent negotiating the settlement subject to the approval of the Regional Director. It should also be stressed that the proposal is based on available facts and is being made without prejudice to any other position that might be taken should the settlement efforts fail. The approach should furnish "protection" against a refusal of the Regional Director to acquiesce in the proposed arrangement because of disagreement on the facts or law, any change of position that might follow the procurement of additional facts, and/or any "stiffening" of requirements should further action be deemed necessary (i.e., insistence on a consent judgment).

10128.4 *Draft in Advance of Negotiations:* If time permits, a draft of the proposed settlement agreement should be prepared in advance of settlement negotiations. The draft agreement should include all remedial action that, under the circumstances, might be ordered by the Board on a successful prosecution of the case. Everything should be done to convey that what is being asked of the respondent is *standard* practice. When appropriate, the printed settlement form, NLRB-4775, should be used. The form is adaptable for settlements of either employer unfair labor practices or union unfair labor practices. Care should be taken when using the form to strike out those words and phrases that are not applicable to the particular settlement situation. (The types of settlements to be proposed are discussed under sec. 10140.) The respondent also should be told that any deviations from standard practice, while appropriate under certain circumstances, must be supported by valid justifications.

10128.5 *Nature and Limitations of Settlement Discussions:* When the possibility of settlement is real, and in order to promote settlement, the Region should be prepared to openly discuss the legal theory and the cases on which it relies.

In addition, it should be prepared to discuss the nature of the evidence on specific violations short, of course, of revealing the names of witnesses. Following are examples of the kind of evidence that, in appropriate circumstances, should be revealed to the respondent.

a. With respect to an allegation of surveillance, inform the respondent that we have evidence from more than one witness that a supervisor [give name] was observed on the night of [give date] about [give time] in an automobile [describe] and further indicate that our witnesses have been able to describe the manner in which the supervisor was dressed.

b. In an 8(a)(3) case where the respondent is defending that the alleged discriminatee was discharged because of absenteeism, we should indicate that we have evidence that the supervisor orally excused the absences of the discriminatee and that we have evidence from several employee witnesses that their absences of a similar nature were also orally excused by several employer supervisors.

c. In an 8(b)(7)(C) case, we should indicate that we have witnesses who overheard, on a particular date and at a particular place, the business representative and the steward in a discussion wherein it was conceded that the purpose of picketing was not area standards, but was recognitional and organizational. In such a case, we can also inform the respondent that we have evidence from several employee witnesses that on a particular date they were contacted by a particular business agent who solicited authorization cards from these witnesses.

It should be clear that the above-described specificity in settlement discussions should occur only where settlement is a *real* possibility. Where in the Region's good judgment the possibility is very remote, the Region is not required to engage in marathon detailed settlement discussions for the purpose of permitting the respondent to discover the General Counsel's case.

While settlement discussions should be sufficient to explore fully all settlement possibilities, they should not be permitted to drag out unnecessarily. In this connection, it is usually useful to require the respondent to state all objections to the proposed settlement before discussing any one of them individually. As soon as agreement is reached as to the basic requirements of the settlement agreement, the respondent's signature should be obtained. For example: If the respondent agrees to reinstate with backpay, but the amount of backpay plus interest computed at the adjusted prime interest rate in effect has not been computed, the agreement may, under certain circumstances, be completed and executed without the amount of backpay specified, but should include the statement "amount of backpay plus interest to be computed by the Regional Director in accordance with existing Board formula."

If the amount of backpay can be liquidated at the time of basic agreement to the settlement, such amount should be specified in both the settlement agreement and in the notice. (In an *informal* settlement, listing backpay in the notice shall be within the Regional Director's discretion; in connection with *formal* settlements, see further discussion on this point under sec. 10164.5.)

10128.6 *Participants:* Generally, settlement discussions, to be most effective, should be conducted with the respondent alone, or with its representative or counsel. Usually, a joint conference of the parties is useful only to dispose of details after the respondent has agreed in principle to the settlement. The joint conference, when held, should not be made the occasion for recriminations, arguing merits, expounding theories, investigation, or "horse-trading." A request that a stenographer record the discussions should ordinarily be rejected by the Board agent, who should explain that the presence of a recorder is a deterrent to free and open discussion and exploration of possible solutions.

10130 *Substance*

10130.1 *Generally:* Settlements are as varied as the circumstances of cases and no standards can be set down that will cover all cases. The principles appearing in this subsection are offered as guides for action.

Problems involving reinstatements, computation of backpay, interest, deductions and withholdings, and lump sum settlements are substantially the same as those encountered in compliance with administrative law judge decisions, Board orders, and court judgments, and substantially the same principles should be applied. (See Compliance Manual.)

In preparing settlement agreements, both formal and informal, that provide for interest on backpay be sure to include the following footnote:

> Interest computed at the adjusted prime interest rate in effect per annum shall be added to [here insert backpay, dues, fees, and/or assessment, as appropriate] to be computed in the manner set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

A lump sum settlement should be based on the combined estimate of net backpay and interest (sec. 10623.4). NOTE: Social security and withholding taxes are deducted on the amount of backpay but not on the interest. Interest payments are not "wages" subject to these taxes.

10130.2 *Reinstatement Refused or Not Desired:* Where, because of nondiscriminatory changes in the charged party's operations, reinstatement to one's old position is not feasible (sec. 10528), it may be agreed that there will be reinstatement to another position or that employment will be offered at some time in the future. In such cases, the settlement agreement should set forth specific details in order to avoid future difficulties. Also, if an offer of reinstatement has been refused or the discriminatee does not desire reinstatement, the settlement agreement should so state.

10130.3 *Joint and Several Liability:* In companion CA–CB cases growing out of the same acts of discrimination, the settlement agreement may require the respondent employer and the respondent union jointly and severally to make whole the discriminatees. The agreement should generally not attempt to apportion the liability between the employer and the union. However, where the joint and several liability of an employer and union refers solely to a dues reimbursement remedy and they agree that the union alone shall make such reimbursement, no further efforts need be made to require equal apportionment of the liability in the absence of unusual circumstances such as a domination of the union by the employer.

In cases when all respondents indicate a desire to settle, each should pay its equal share. When one party is willing to settle, but the other respondent insists on trial of the case, a settlement agreement may be taken from the party who is willing to settle. Appropriate provisions should be inserted in the agreement, however, to assure that the respondent or respondents signing the agreement will bear only its or their proportionate share of the backpay liability unless efforts to obtain payment of the remaining portion of the backpay from the other respondent or respondents should fail. It is suggested that the full amounts of backpay (including the portion that should be borne by the party or parties refusing to enter into the settlement) be set opposite the names of the discriminatees in the "make-whole" provisions of the agreement and that language similar to the following be inserted in another paragraph of the agreement:

> For purposes of this agreement [stipulation] the respective amounts of backpay set forth herein represent the full loss of earnings of these employees respectively to this date. Upon [approval of this agreement] [entry of a Board order pursuant to this stipulation] the respondent will pay immediately to each of said employees one-half of the amount set forth opposite that individual's name. The respondent will pay the remaining half of each such amount only on being informed by the Regional Director that efforts to obtain payment from any other respondent have failed.

10130.4 *Departure from Equal Proportions Basis:* One of two potential joint-and-several respondents may be willing to settle by paying its share of the backpay as well as the share of the other respondent. Such offer *should not be solicited* as part of the settlement agreement. However, if such desire is a *voluntary* one and *all* reasonable efforts to obtain settlement from the other respondent have failed, full payment may be accepted from one in order to avoid hardship to the individuals involved.

The offer of one respondent to pay all shares voluntarily may be rejected when this appears advisable (e.g., when the recalcitrant respondent has repeatedly proved difficult in this connection and when formal proceedings with possible eventual collection therefrom would have an exemplary impact). The offer to pay all shares of the backpay should be accepted only without prejudice to processing further in all other respects the case against other respondents and only with the clear understanding of the parties that full payment satisfies our make-whole requirements and forecloses us from later seeking a proportionate share from other respondents. In this connection, Board clearance, through the Division of Operations Management, is required for the proposed acceptance of a formal backpay settlement on other than a proportionate basis.

The above statements about division of backpay liability are, of course, applicable only to periods during which there may be joint-and-several liability on the part of more than one respondent. For a period in respect to which only one respondent is liable, the agreement should, of course, provide for backpay liability only for the one respondent. For example, a labor organization may toll its liability for backpay by giving notice to the employer and the employee involved that it no longer objects to the employment of the discriminatee by the respondent employer. Under these circumstances, it is not necessary that the backpay liability be apportioned for the period after the respondent union has tolled its liability.

10130.5 *Respondents Insolvent:* When there are several respondents involved in a case and one or more becomes insolvent before paying its share, the unpaid amount should be solicited without delay from the other respondents. (See also 10505 regarding the respondent's ability to comply and issues of derivative liability.)

10130.6 *Parties; 8(a)(2) or 8(b)(3) Situations:* In cases involving disestablishment, withdrawal of recognition from, or voiding of all or any part of an agreement with a labor organization, that organization should be a party to the agreement (secs. 10134.3 and 10134.4).

10130.7 *Nonadmission Clauses:* Nonadmission of liability by the respondent should not be routinely incorporated in settlement agreements. Nonadmission clauses may not be incorporated in a formal settlement which does not provide for a court judgment (see sec. 10168, par. 10). Board policy is that nonadmission clauses should not be included in notices. (See *Independent Shoe Workers of Cincinnati, Ohio (U.S. Shoe Corp.)*, 203 NLRB 783 (1973).)

10130.8 *Position of Discriminatees:* If the respondent wishes to know whether discriminatees desire reinstatement and how much backpay is due, every effort should be made to ascertain and convey this information. On the other hand, no effort should be made to persuade discriminatees to take a position on reinstatement for the purpose of obtaining settlement other than they would take if formal action were undertaken; on the contrary, they should be told what they might expect should formal action be successfully taken and what they might expect should the case eventually be lost.

Even though a discriminatee's willingness to forgo reinstatement is a determining factor in a respondent's willingness to settle, the stipulated order and notice in such case should recite either (a) that discriminatee does not desire reinstatement and would not accept such an offer or (b) that an offer of reinstatment has been refused, as the case may be. In such cases, the discriminatee's *rejection for purposes of this settlement* should also be procured in writing and inserted in the file.

10130.9 *Remedy; Exclusive Hiring Hall Arrangement:* In many instances referrals to jobs pursuant to an exclusive hiring hall arrangement are made from a seniority list based on the number of hours worked in the employing group. Careful consideration should be given to the seniority standing of the discriminatee in settling this type of case. The settlement agreement, in addition to backpay, should provide that the discriminatee be given credit in the seniority formula for the number of hours of employment discriminatorily denied him.

10132 *Notices to be Posted*

10132.1 *Posting and Language of Notices:*

a. *Posting, generally:* Settlement agreements should provide for posting of notice to employees or union members that reassure them of their rights under Section 7 and that outline the action taken in connection with the settlement. The posting should be for 60 consecutive days unless prior clearance has been obtained from the Division of Operations Management.

b. *Posting, CA–CB cases:* Settlement agreements entered into in related CA and CB cases (where the company and the union are jointly and severally liable) should provide for posting of the respondent union's notice and the respondent company's notice at the same places and under the same conditions.

c. *Language:* While the Regional Offices have considerable latitude in determining language to be used, they should, in general, follow the language of notices in Board orders in comparable cases. Equal care should be taken in drafting language for use in notices in informal cases and for recommendations to the administrative law judges and the Board in formal proceedings. Particularly remember, while it is proper to require the posting of a notice that declares publicly that a party will conform *in the future* to the mandates of the Act, it is improper to force a party to confess past guilt. The cases precluding such confession of guilt are collected in *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438–439 (1941). Thus, notices may not be phrased so as to require a respondent to admit a violation of the Act, either directly (e.g., "We violated the law when we fired John Smith") or by implication (e.g., "We will not fire anyone for union activity *again*").

10132.2 *Preparation:* The notices to be posted should be prepared by the Regional Office and not by the respondent. Use the preprinted notices available to Regional Offices.

Informal Settlement

Forms NLRB-4722 and 4724 (Notice to Employees)
Forms NLRB-4723 and 4725 (Notice to Members)
Forms NLRB-4781 and 4782 (Notice to Employees and Members)

Formal Settlement

Forms NLRB-4727 and 4728 (Notice to Employees)
Forms NLRB-4726 and 4729 (Notice to Members)
Forms NLRB-4758 and 4759 (Notice to Employees and Members)

Insert the following suggested language in the formal settlement notice, as appropriate:

> "Pursuant to a stipulation providing for a Board Order"
>
> or
>
> "Pursuant to a stipulation providing for a Board order and a consent judgment of any appropriate United States Court of Appeals"

Notices attached to settlement agreements, both formal and informal, which provide for interest, should include the backpay and/or dues, reimbursement paragraph—"with interest computed at the adjusted prime interest rate in effect" (sec. 10130.1). For suggested language in notices see sections 10136, 10168, and 10170.

10132.3 *Union-Security Proviso:* In States where union security is prohibited, the Regional Director is authorized to delete, upon request of the respondents, the standard union-security proviso:

> . . . except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(For suggested language in notices in 8(b)(4) and 8(e) settlement, see sec. 10136.)

10132.4 *Posting Sites:* 8(a) notices are to be posted at the situs or premises of the employer involved. 8(b) notices should be posted at the union hall and, where appropriate, at the union meeting place and at the situs or premises of the employer(s) involved. Where the circumstances require it, there should be a mailing of notices to individuals. (See sec. 10132.1 where joint CA and CB cases are involved.)

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Occasionally, mere posting will be considered inadequate—for example, where the work project at which the unfair labor practices took place has terminated or has been discontinued, where there was an unlawful hiring hall that affected employment of persons who are widely scattered or unidentified, or where the unlawful activities involve "general" or "widespread" practices. In such cases, publication in a daily newspaper of general circulation, as opposed to publications serving only specialized groups of readers, should be required. Publication should be at the respondent's expense and should be effected on 3 separate days within a 1-week period designated by the Regional Director. Such publication should be in addition to, not a substitute for, such other notice posting as is required by the circumstances.

10132.5 *Number Required:* At the time the settlement agreement is executed, the number of notices required for posting should be ascertained so that a number sufficient for attachment to copies of the agreement and for eventual posting can be prepared in the first "run."

10134 *Parties to Informal or Formal Settlements*

10134.1 *Charged Party (Respondent):* The charged party is a necessary signatory to any informal or formal settlement. Without his cooperation there can be no basis for settlement.

10134.2 *Charging Party:*

a. Normally, the charging party should be a party to the settlement.

b. *Unilateral settlement:* Where the respondent agrees to take action that will effectuate the purposes of the Act, an agreement may be consummated without the participation of the charging party. (See sec. 10152 on informal settlements and sec. 10164.7 on formal settlements.)

c. Where, for reasons of his/her own, the charging party does not wish to enter into the agreement but has no real objections to the remedial action proposed, he/she may be willing to sign a separate document to the effect that he/she is aware of the contents of the agreement and that he/she has no objections to it or will not appeal from a dismissal based on it.

10134.3 *Other Parties Involved in CA Cases:* In every CA case in which the contemplated settlement provides for the disestablishment of a labor organization, or for the withdrawal and/or withholding of recognition from a labor organization, or for ceasing to give effect to part or all of an existing collective-bargaining contract with a labor organization, that organization should be a party to the settlement. It must, before approval of the agreement,

a. Be a party or signatory to the agreement itself; or

b. File with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement; or

c. File with the Regional Director an affidavit signed by the last executive officer of the organization certifying that the organization is dissolved and out of existence and that it does not claim to represent any of the employees in the unit involved.

Where, in a formal settlement, either b or c is used, the letter, document, or affidavit must be made part of the record (see sec. 10166.5).

10134.4 *Other Parties in CB Cases:* In a CB case in which the contemplated settlement provides for ceasing to give effect to part or all of an existing collective-bargaining contract with an employer, that employer should be a party to the settlement. It must, before approval of the agreement, follow step a or b, above.

10134.5 *Nonparticipation of Necessary Parties:* Where the participation of other necessary parties cannot be obtained, it is necessary that the General Counsel's representative proceed formally. The allegedly dominated organization, for example, should be served with complaint and notice of hearing. If it fails to appear, only the respondent, charging party, and the General Counsel's representative remain as participants in the case. Under such circumstances, they may enter into a settlement stipulation reciting the facts of service on and nonappearance of the 8(a)(2) union.

10134.6 *CE Cases:* Settlements of cases involving CE charges contemplate that the charged party will cease giving effect to or attempting to enforce that part of the contract that contravenes the limitations of Section 8(e) of the Act. In addition, no settlement should be approved in a CE case where only one of the contracting parties is charged, unless the party not charged shall:

a. Be a party or signatory to the agreement itself; or

b. File with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement.

10136 *Proposed Notices in 8(b)(4) and 8(e) Settlements*

10136.1 *8(b)(4) Notices:* The following language is suggested to assist in drafting proposed notices:

WE WILL NOT (a) engage in, or induce or encourage any individual employed by ________________ or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, or (b) threaten, coerce, or restrain __________________, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is [insert appropriate object listed below]. [Where the violation is limited to either 8(b)(4)(i) or (ii) the clause not involved should be omitted and the "where in either case an object thereof is" should be changed to "where an object thereof is."]

1. (a) . . . forcing or requiring __________________, an employer or self-employed person [in situations where the union is attempting to force a number of employers or self-employed persons to join, it would be appropriate to substitute "__________________, or any other employer or self-employed person"] to join __________________, or any other labor or employer organization.

or (b) . . . forcing or requiring __________________, to enter into any agreement containing the following clause: [set forth specific clause] or to enter into any other agreement that is prohibited by Section 8(e) of the National Labor Relations Act, as amended.

2. (a) . . . forcing or requiring __________________, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with __________________ ["or any other person" if appropriate] or (b) . . . forcing or requiring __________________ ["or any other employer" if appropriate] to recognize or bargain with a labor organization as the representative of its employees unless and until such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act. [If only one of these objects is involved, that object only should appear in the notice.]

3. . . . forcing or requiring __________________ to recognize or bargain with __________________, or any other labor organization, as the representative of its [or his/her] employees so long as __________________, or any other labor organization, is the certified representative of such employees pursuant to provisions of Section 9 of the National Labor Relations Act.

> 4. . . . forcing or requiring ________________ ["or any other employer" if appropriate] to assign the work of [describe work] to employees who are members of or represented by ________________, rather than to employees who are members of or represented by ________________ [or who are not members of or represented by ________________], unless and until ________________ is certified by the Board, or the Board orders ________________ to bargain with ________________, as the representative for employees performing such work.

10136.2 *8(e) Notices:* Although the violation under Section 8(e) is to "enter into" the prohibited contract, the language in the proposed notice for settlements involving Section 8(e) provides, in addition, that the respondent employer and/or union will not "maintain, give effect to, or enforce" the 8(e) contract or agreement. The latter was inserted because it is believed that such remedial language is necessary to give meaning and effect to Congress' intent to interdict "hot cargo" clauses in collective-bargaining contracts.

The following is proposed as an appropriate notice where there is a settlement involving Section 8(e):

> WE WILL NOT maintain, give effect to, or enforce our agreement with [union or employer], entered into on ________________, insofar as it provides: [set forth clause]; or to any extension, renewal, modification, or supplement thereof, or enter into any other agreement with ________________ ["or any other (labor organization) (employer)" if appropriate] whereby [we] [such employer] cease(s) or refrain(s) or agree(s) to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any employer, or to cease doing business with any other person.

10137 *Settlement of 8(b)(4)(D) Cases:* In view of the legislative purposes underlying Sections 8(b)(4)(D) and 10(k), a work assignment dispute would not be viewed as "settled" if the charging party involved in the dispute objects to the proposed settlement agreement and if the agreement does not contain an unequivocal disclaimer by the charged union to the disputed work. It should be kept in mind, however, that where the work assignment dispute is to be viewed as no longer extant because of a *clear and unequivocal* disclaimer to the disputed work at an appropriate time, further proceedings on the charge would be unwarranted. In such cases the charge, absent withdrawal, should be dismissed.

10137.1 *Unilateral Settlement Agreement:* A unilateral settlement agreement that provides for no unequivocal disclaimer by the charged union to the disputed work should not be approved over the objection of the charging party involved in the dispute, since such a settlement could not be said to have settled the underlying dispute. On the other hand, if the respondent union clearly and unequivocally disclaims interest in the disputed work, a settlement agreement of the charge may be approved even over the objection of the charging party.

In the first instance, reassertion of the claim to the disputed work by the charged union, unaccompanied by new 8(b)(4)(i) or (ii) conduct after execution of a "settlement" agreement that contains no disclaimer, would not permit its being set aside since the union thereby merely undertook not to engage in subsection (i) or (ii) conduct in support of an 8(b)(4)(D) object. On the other hand, where a unilateral settlement agreement contains a clear and unequivocal disclaimer by the respondent union of the disputed work, a new claim for the disputed work by the respondent union would be inconsistent with the disclaimer in the settlement agreement and, even in the absence of new conduct, would accordingly warrant setting aside the settlement and proceeding in the case.

10137.2 *Settlement Agreement Where No Objection by Charging Party:* A settlement agreement can be approved, even in the absence of a clear and unequivocal disclaimer by the respondent union to the disputed work, if the charging party involved in the dispute agrees to the settlement. In such cases the respondent union's agreement to refrain from 8(b)(4)(D) conduct is apparently accepted by the charging party as a resolution of the dispute and, accordingly, the settlement agreement can be approved by the Regional Director.

However, if the agreement does not contain a clear and unequivocal disclaimer by the respondent union to the work in dispute, the reassertion of a claim to the disputed work by the respondent union would not, standing alone and in the absence of new 8(b)(4)(i) or (ii) conduct, permit setting aside the settlement agreement. Consequently, prior to approval of a bilateral settlement agreement without a clear and unequivocal disclaimer by the respondent union to the disputed work, the

Region should satisfy itself that the charging party is aware that merely a new claim by the charged union for the work in dispute would not warrant setting aside the settlement agreement.

10140 *Types of Settlement*

10140.1 *Generally:* In some cases, the filing of a charge may result in the taking of action by the charged party, which while not coinciding with Board remedies may satisfy the charging party; in others, the charged party may take some or all of the remedial action that the Board would order but will not enter into a settlement agreement calling for such action. Whether either of these categories of "settlement" will be considered sufficient to dispose of the charge will be discussed in non-Board settlements (sec. 10142); but whether or not they serve this purpose, they are not considered settlement agreements.

A settlement agreement, as the term is used here, is an agreement on which the Board has placed its imprimatur, with which the Board will police compliance, and on the basis of which, when complied with, the parties are notified that the matter has been closed (sec. 10150).

Settlement agreements consist of *informal* (secs. 10146–10155) and *formal* agreements (secs. 10164–10174).

10140.2 *Informal v. Formal, Prior to Complaint:* Where complaint has not yet issued and there is no history of unfair labor practices by the charged party indicating an apparent likelihood of recurrence or extension of the instant unfair labor practices, the normal device for effecting a voluntary adjustment is the *informal* settlement.

Where there is an unfair labor practice history tending to demonstrate a likelihood of recurrence or extension, a *formal* settlement should be sought even though complaint has not yet issued.

10140.3 *Violence:* Where in a particular case there is either continuing violence or an apparent likelihood of recurring violence, even absent an unfair labor practice history, a *formal* settlement should be sought, even though complaint has not yet issued.

Where there are relatively isolated instances of violence that have since terminated and if the Regional Director is satisfied that in all the circumstances there will be no recurrence of violence, an *informal* settlement may be utilized to effectuate a voluntary settlement.

10140.4 *Deviation from Rules:* Deviation from these rules requires explanation in the file.

10142 *Non-Board Settlements:* On occasion during the course of the investigation, Board personnel may be asked, by one or more of the parties to a case, whether they may meet directly with each other "to work out a mutually satisfactory solution." (On other occasions, they may meet without consultation with the Region.) The official attitude of the Region should be that it would not, if it could, prevent the parties from ironing out their difficulties privately. However—and this is particularly important where rights of individuals are involved—the inquiring party should be informed that any arrangement thus reached will not necessarily be recognized by the Board as disposing of the case. Investigation will continue.

Should the Region be notified that a "private settlement" has been reached and that the charging party wants the case dropped (either in such language or by submitting a withdrawal request) the terms of the settlement should be procured. (See sec. 10122.6.) Where the non-Board adjustment encompasses the obligation to bargain and the adjustment includes extension of the certification year, it may be appropriate to note this in the non-Board adjustment. See *Straus Communications v. NLRB*, 625 F.2d 458 (2d Cir. 1980); *Gulf States Manufacturers* v. *NLRB*, 598 F.2d 896 (5th Cir. 1979); *Vantran Electric Corp.*, 231 NLRB 1014 (1977), enf. denied 580 F.2d 921 (7th Cir. 1978). Cf. *Deister Concentrator Co.*, 253 NLRB 358, fn. 2 (1980).

The approval of the withdrawal request should then be granted or withheld in accordance with criteria laid down in section 10120. In those situations where individual discriminatees are not represented by counsel or a union, caution should be exercised to insure that the non-Board settlment is not repugnant to the purposes of the Act or that an individual has not been taken advantage of in the private negotiations.

Likewise a charged party may, on occasion, take remedial action as proposed by a Regional Director without, however, being willing to enter into a written settlement agreement or to acknowledge by a posted notice that the action is being taken pursuant to settlement of a charge. (Examples: Interrupted bargaining negotiations may be resumed; a dischargee may be offered reinstatement with backpay; a union may cease striking for an illegal form of union security.)

When such action is accompanied by a voluntary withdrawal request from the charging party, approval of the request should ordinarily be granted. The case may be closed as adjusted, but the parties should not be notified that the remedial action has the imprimatur of the Board. They should be sent the usual withdrawal request approval letter.

In light of the Board's ruling in ***Winer Motors***, 265 NLRB 1457, the Region should take into consideration the strictures of Section 10(b) in deciding whether to approve a withdrawal request before all of the requirements contemplated by the non-Board settlement have been carried out. Approval may be withheld pending full performance of the requirements of the parties' private settlement. In the normal situation when all of the requirements of the non-Board settlement have been carried out, the Region is to continue to issue the standard letter approving the withdrawal request.

In those rare cases when approval is given before all of the requirements have been carried out, the following letter should be used in conditionally approving the withdrawal:

> This is to advise you that I have conditionally approved the withdrawal request that [you] [the charging party] submitted in the above matter. I have conditionally approved the withdrawal request based on a representation that a private settlement has been reached between the parties. Therefore, this approval is conditioned on the performance of the undertakings in the private settlement between the parties. On application by the charging party, supported by evidence that those undertakings have not been complied with, the charge is subject to reinstatement for further processing.

See section 10148.5 concerning handling of a Board or non-Board settlement agreement at trial before an administrative law judge.

If approval is withheld, the parties should be so notified, and investigation should continue.

If approval is granted, the case may or may not be closed as *adjusted*. The case should be closed as adjusted if the terms of the settlement, while not constituting the full remedy that appears to be called for, provide for a substantial part of the remedy and are all consistent with the purposes of the Act. It should not be closed as adjusted if this standard is not met—it should be closed if withdrawn "because charging party does not wish to proceed."

In no such case should the parties be notified that the settlement has the approval of the Board. They should be sent the usual withdrawal request approval letter.

When the action is not accompanied by a withdrawal request because the charging party is not satisfied that the action taken remedies the unfair labor practices, the Regional Director must determine whether effectuation of the purposes of the Act calls for further proceedings. Normally, if the action taken is a full or substantial remedy in fact, if there is no history of prior similar practices by the same charged party, and if there is no likelihood of recurrence, the charge should be dismissed on the ground that effectuation of the purposes of the Act does not warrant further proceedings.

(See sec. 10122.) The case, when closed, should be considered adjusted and so reported to Washington.

10146–10155 *Informal Settlements*

10146 *Nature of Informal Settlements*

10146.1 *Generally:* An informal settlement agreement is a simple written agreement, providing that the charged party will take certain action in remedy of the unfair labor practices. It requires the approval of the Regional Director but does not provide for a Board order or court decree.

In considering whether to approve an informal settlement, the Regional Director should take into consideration whether there is a history of unfair labor practices by the same charged party.

See section 10124.4 for cases in which Washington should be consulted.

This is the most valuable and efficient method of adjusting an unfair labor practice charge and, unless circumstances indicate otherwise (see infra), is the goal most to be sought in cases that have merit.

See section 10653 for settlement language in those cases when installment payment or a security agreement may be appropriate.

10146.2 *After Complaint:* Informal settlement agreements may be used after complaint has issued, provided that there has been no extensive history of unfair labor practices by the charged party.

10146.3 *Settlement Agreement Form:* Form NLRB-4775 will accommodate settlements in which the respondent is either an employer or a labor organization. It will be necessary, when preparing the form, to strike out those words and phrases that may not be applicable to the particular settlement situation. (The form is printed in sets on carbon-backed paper. Avoid accidental smudging of copy pages and use a ballpoint pen when signing to obtain legible signatures on distribution copies.) For necessary parties see section 10134. For details as to effectuation, see sections 10150–10152.

10146.4 *Partial Bilateral Settlements in a Single Case:* If an informal bilateral settlement by its terms does not dispose of all violations alleged in the charge, but it is nevertheless intended by the parties and the Region to be a settlement of the entire charge, the charge should be amended to conform to the settlement or a sentence should be inserted in the settlement that "this settlement disposes of all unfair labor practices alleged in the charge."

When the Region does not intend to remedy certain alleged unfair labor practices by settlement, and these unfair labor practices are to be alleged in a complaint, the settlement agreement should so note by specifically excluding these unfair labor practices from the agreement. For example, "This settlement does not remedy the allegations that John Doe was terminated by the Charged Party on or about January 2, 19__, or that the Charged Party during the period from January 1, 19__, through January 30, 19__, has refused to bargain in good faith by bargaining directly with employees concerning wage increases." Cf. *Sundstrand Castings Co.*, 209 NLRB 414 fn. 2 (1974).

Where some allegations of the charge are settled bilaterally and others are dismissed, the settlement should not be approved prior to the expiration of the appeal period (if no appeal is filed) or the denial of the appeal on the dismissed allegations. (This includes situations where the only dismissed allegation is a refusal to find strikers to be ULP strikers.) If the appeal is sustained, the Region should attempt to include in the settlement the allegations found meritorious on appeal. If such efforts fail, the Region may proceed as set forth in the preceding paragraph if the parties are agreeable to the partial settlement, knowing that complaint will issue on the other allegations found meritorious on appeal; or the Region may refuse to approve the partial settlement and proceed to complaint on all the allegations.

(For partial unilateral settlement in a single case, see sec. 10152.2. For settlement of some, but not all, of related cases, see sec. 10155.)

10148 *Informal Settlement After Issuance of Complaint*

10148.1 *Clearance or Transmittal Requirements:* Advance clearance from Washington for acceptance of an informal settlement after issuance of complaint is not required either before or after opening of hearing.

In cases not requiring prior Washington approval, the file should contain a memorandum noting the settlement action and reasons therefor.

(See also sec. 10275, wherein notification of withdrawal of complaint is required.)

10148.2 *Agreement Executed Prior to Opening of Hearing:* Regional Directors have the authority to approve informal settlement agreements executed at any time prior to the opening of the hearing and, on such approval, to withdraw the complaint. Form NLRB-4775 is designed to serve both of these purposes.

10148.3 *Obtaining Approval of Informal Settlement Agreement After Hearing Opens:* Whether the settlement is all party or unilateral, and whether the hearing is in progress or has been adjourned or closed, the agreement must be submitted to the administrative law judge for approval pursuant to Section 101.9(d) of the Statements of Procedure, if a decision has not issued. If the hearing is in progress, the administrative law judge shall indicate approval or rejection on the record. If settlement is reached after the hearing has been adjourned or is closed, but before issuance of a decision, the agreement is submitted to the administrative law judge for approval; the administrative law judge's action is thereafter indicated by issuance of an appropriate order and notification to the parties. In the latter situation, the Regional Office should follow up through the office of the Chief Administrative Law Judge if no ruling on the proposed settlement is forthcoming within a reasonable period of time.

In the event an administrative law judge disapproves a settlement or approves a unilateral settlement, the General Counsel's representative (or any other aggrieved party) may ask for leave to appeal to the Board as set forth in Section 101.9(d)(2) of the Statements of Procedure and Section 102.26 of the Rules and Regulations.

If the settlement agreement is approved by the administrative law judge and there is no appeal, the General Counsel should move for an indefinite adjournment in order for the respondent to comply with the settlement. After compliance has been effected, a motion to withdraw the complaint should immediately be sent to the administrative law judge.

In the event of noncompliance thereafter, the Regional Director may set aside the agreement and institute further proceedings (see Sec. 101.9(e)(2) of the Statements of Procedure).

(See sec. 10164.6b for approval of formal settlement agreements after hearing opens.)

10148.4 *Role of Administrative Law Judge in Settlement Effort:* Before the hearing opens, the administrative law judge will advise the parties of the importance to the Board of settlements; invite them to take advantage of such opportunity; assure them that reasonable requests for hearing recesses for the purpose of settlement will be granted; inform them that settlement efforts will in no way be construed as a sign that their case is weak; and in fact, recess the hearing at specific times to urge reconsideration by the parties of the advisability of settling the case.

At the conclusion of the General Counsel's case and again before the close of the hearing the administrative law judge may afford the parties opportunity to explore settlement of the issues, thus averting the need for Board decision.

10148.5 *Appeal from the Decision of an Administrative Law Judge to Accept a Withdrawal of the Charge:* Where the parties, at trial, reach a settlement (non-Board or Board) that is viewed as repugnant to the Act, the General Counsel should protest the proposed withdrawal of the charge, citing *Clear Haven Nursing Home*, 236 NLRB 853 (1978), and if necessary, promptly file a request for special permission to appeal the administrative law judge's ruling if the administrative law judge approves the withdrawal of the charge. In the event the administrative law judge dismisses the complaint, a request for review should be filed within 28 days in accordance with Section 102.27 of the Rules and Regulations. Such action should only be taken after consultation with the regional attorney.

10148.6 *Inclusion in Settlement of Provisions That Appear in Board Order and Remedy Section:* In drafting language to be placed in the settlement agreement, one should be careful to include, when applicable, provisions that may be found in the Board's order and remedy section as well as those that appear in the Board's notice. The mere patterning of the settlement agreement after a Board notice may result in the omission of important aspects of an appropriate remedy.

10150 *Effectuation; Performance; and Closing of All Party Settlement Case*

10150.1 *Action on Approval of Agreement:* On approval by the Regional Director of a settlement agreement in which the charging party joins, the parties through their attorneys or representatives should be informed of the fact and the charged party through an attorney or representative should be requested immediately to take the action called for in the agreement. The charged party should be furnished with sufficient copies of the notice and be given whatever other assistance the Region can render toward carrying out the agreement.

10150.2 *Policing Performance:* Performance of the agreement should be policed in the same manner as administrative law judge decisions, Board orders, and court judgments. (See sec. 10504.6.) If the 5- and 60-day reports called for by the agreement are not received, parties should be reminded of the requirements.

10150.3 *Closing of Case:* When the Regional Director is satisfied that the provisions of the agreement have been carried out—after passage of the notice-posting period—the case should be closed as adjusted, and the parties should be so notified. The notification should specifically state that the closing is conditioned on continued observance of the terms of the settlement agreement.

10152 *Effectuation; Performance; and Closing of Unilateral Settlement Case*

10152.1 *Charge Found Meritorious:* In cases where the Regional Director finds the charge to be meritorious, the procedure is as follows:

a. *Notification to Charging Party:* When a charging party refuses to enter into a proposed settlement, either formal or informal, the attorney or representative of record, if any, should be sent a letter with a copy to the charging party setting forth briefly the reasons for proposing its approval.

   In particular, reasons for any departure from standard Board remedy practice should be given. Reasons should be formed as an expression of judgment, rather than assertion of fact or law.

   The charging party should also be informed that any objections to the settlement, together with supporting argument, should be submitted in writing to the Region within 7 days after service of the letter. (See Rules, Sec. 101.9(c)(1).)

If the settlement is to be approved, notwithstanding the objections (or at the end of the 7-day period if objections are not submitted), the charging party should be so informed and given a brief statement of the reasons for doing so.

b. *Dismissal of Charge:* On approval of an informal settlement agreement, the Regional Director should dismiss the charge in accordance with the terms of the agreement.

The dismissal letter, when issued, should cite the agreement as the basis for dismissal; the pattern letter shown in section 10122.8 should contain the following second paragraph:

> In view of the undertakings contained in the attached settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. I am, therefore, refusing to issue [reissue] complaint in this matter.

The last paragraph, including instructions for filing an appeal, should be unaltered; and a copy of the approved agreement should be attached.

10152.2 *Partial Unilateral Settlement in a Single Case:* Where the Region does not intend to remedy certain alleged unfair labor practices by the unilateral settlement, and these unfair labor practices are to be alleged in a complaint, the settlement agreement should so note by specifically excluding these unfair labor practices from the agreement. Additionally, the settlement should provide that the evidence bearing on the settled allegations may be introduced into evidence at any hearing on the unsettled allegations.

Where some of the allegations of the charge are settled unilaterally and others are dismissed, the settlement should not be approved prior to the expiration of the appeal period (if no appeal is filed), or the denial of the appeal on the dismissed allegations. (This includes situations where the only dismissed allegation is a refusal to find strikers to be ULP strikers.) Whenever either of these events occur, the unilateral settlement should be approved and the portion of the charge that has been settled should be dismissed as set forth in section 10152.1. On the other hand, if the appeal of the dismissed allegations has been sustained, the Region should attempt to include in the settlement the allegations found meritorious on appeal. If such efforts are successful but the charging party still refuses to enter into the settlement, the revised settlement should be approved and the charge dismissed as set forth in section 10152.1. If such efforts fail, the Region may proceed as set forth in the preceding paragraph if the charged party is still agreeable to the partial settlement, knowing that complaint will issue on the other allegations found meritorious on appeal (in this situation the settlement should be approved and that portion of the charge underlying the settlement dismissed as set forth in sec. 10152.1), or the Region may refuse to approve the partial settlement and proceed to complaint on all the allegations.

(For partial bilateral settlement in a single case, see sec. 10146.4. For settlement of one of related cases, see sec. 10155.)

10152.3 *Compliance:* After the appeal period has passed, if no appeal has been filed, the Regional Director instructs the charged party to take the action called for in the agreement. If an appeal has been filed, the instruction is not given unless and until the General Counsel has upheld the action of the Regional Director. In either case, the policing of compliance and closing of the case should be in accord with the procedures described in sections 10150.2 and 10150.3.

If the charged party commenced performance of the terms of the agreement *prior to* being so instructed by the Regional Director, the performance eventually required shall be only to the extent not already performed.

10154 *Noncompliance:* In the event that, in the opinion of the Regional Director, the provisions of the agreement have not or will not be carried out, the Regional Director will notify the parties of this fact and inform them that, despite the execution of the agreement, such action as appears necessary to effectuate the purposes of the Act will be taken. Thereafter, appropriate action, as if there had been no settlement agreement, will be taken; complaint will be issued, or reissued, and pressed on its merits and not on the basis of noncompliance with the agreement.

10155 *Settlement of Less Than All of Related Charges:* Where there is either a bilateral or unilateral settlement of some but not all of the related charges, the settlement should provide that it does not cover or settle the allegations of the other charges.

10164–10174 *Formal Settlements*

10164 *Nature of Formal Settlements*

10164.1 *Generally:* A formal settlement is a written stipulation calling for remedial action in adjustment of unfair labor practices and providing that, on approval by the Board, a Board order in conformity with its terms will issue. Ordinarily it will also provide for the consent entry of a court judgment enforcing the order.

10164.2 *Use:* A formal settlement agreement may be utilized either before or after issuance of complaint where there is a history of prior unfair labor practices. Further, a formal settlement may be warranted where there is a likelihood of recurrence or extension of the instant unfair labor practices, as well as where there is either continuing violence or a likelihood of recurring violence. In such cases, the complaint is issued simultaneously with execution of the stipulation; stipulation should include a waiver of notice of hearing as well as a waiver of the hearing itself. It should be noted, however, that in no case should there be a sacrifice of remedy in order to procure a formal instead of an informal settlement agreement.

In those situations when a formal settlement agreement is required and it appears that the respondent's purpose in refusing to execute such an agreement is the belief that a Board order can be avoided by complying with the administrative law judge's decision that will issue after hearing, the respondent should be apprised that, under the statute and Sections 102.48 and 101.11 of the Board's Rules and Regulations, a Board order will be issued even though the respondent does not file exceptions to the administrative law judge's decision and agrees to comply with the administrative law judge's recommended Order.

In the absence of unusual circumstances, a respondent who executes a formal settlement stipulation should not be permitted to withdraw from the stipulation after the General Counsel has approved it but prior to the Board's approval of it. *George Banta Co.*, 236 NLRB 1559 (1978). In the event that the respondent attempts to withdraw from the stipulation while it awaits General Counsel approval, the Region should immediately submit the matter, with its recommendation, for advice to the Division of Operations Management.

10164.3 *Basic Record:* The formal settlement provides a stipulation as a substitute for a hearing. The basic record available to the Board (and court) consists of the complaint and charges and the stipulation. If the charge is not in conformance with the complaint on which the stipulation is based, an amended charge should be secured if possible. (The answer, if one has been filed, is a part of the record only if the respondent insists; preferably, it should be withdrawn.) Under the stipulation, the parties agree on facts that add up to unfair labor practices, and agree on an order that the Board may issue. They may or may not agree that an appropriate circuit of the court of appeals may enter a judgment enforcing the order without notice to the respondent.

10164.4 *Court Judgment Preferred:* A stipulation providing for a court judgment is preferred to one without this provision, since this serves as a more efficient deterrent to future violations of the Act. Whether or not there is provision for a court judgment (in addition to a Board order) often depends on whether the respondent does not wish to admit the commission of unfair labor practices. Such an admission is unnecessary where entry of a court judgment is provided for. This is often an important factor in persuading a respondent to consent to the entry of a judgment.

Where a formal settlement stipulation provides for a court judgment, entry of such a judgment will be sought, and no contrary commitment, oral or written, should be made. On the contrary, field personnel negotiating the stipulation should take affirmative measures to make it clear that the settlement contemplates the entry of a Board order and court judgment, even though the Board order may have been complied with in the interim.

10164.5 *Backpay Provisions:* With respect to backpay, it is preferred practice in a formal settlement to liquidate and to set forth the exact amount agreed on rather than to leave it to future computation. (Cf. treatment in informal settlements, see sec. 10128.5.) This amount should be specified in the stipulation and in the notice. And, in order to guard against further loss of earnings that may be incurred because of delay in compliance, it is good practice to include, in the stipulated Board order, a provision that the respondent will make whole the discriminatees for any additional loss of earnings plus interest caused by a failure to offer reinstatement within 10 days of the entry of the Board order, by paying them the respective amounts they would have earned if properly reinstated, less actual earnings, computed on a quarterly basis, from the 11th day after the entry of the Board order to the date of a proper offer of reinstatement. This must include appropriate interest per annum (sec. 10623). Where such a provision is used, the stipulated order should provide also that all payroll and other records necessary to a determination of backpay due will be made available to Board agents. In those situations when the respondent is paying backpay by installment payment, or when the respondent's financial condition is doubtful, the Region may wish to include a security agreement or installment payment schedule in the formal settlement. (See sec 10653.)

10164.6 *Obtaining Approval of Formal Settlement*

a. Before Hearing Opens: A formal settlement requires approval by the General Counsel and by the Board. The settlement should be submitted to the Division of Operations Management with a transmittal memorandum giving all details pertinent to the settlement, *especially calling attention to and explaining any deviations from established law or any unusual facets* (sec. 10172.5). If there is no provision for a court judgment, the reason should be given. The record in the case (sec. 10166.5) must be stapled or securely fastened to the transmittal memorandum.

b. After Hearing Opens:

1. Whether the settlement is all party or unilateral, and whether the hearing is in progress or has been adjourned or closed, the agreement must be submitted to the administrative law judge for approval pursuant to Section 101.9(d)(1) of the Statements of Procedure, if a decision has not issued. If the hearing is in progress, the administrative law judge shall indicate approval or rejection on the record. If formal settlement is reached after the hearing has been adjourned or is closed, but before issuance of a decision, the agreement is submitted to the administrative law judge for approval; the administrative law judge's action is thereafter indicated by issuance of an appropriate order and notification to the parties. In the latter situation, the Regional Office should follow up through the office of the Chief Administrative Law Judge if no ruling on the proposed settlement is forthcoming within a reasonable period of time.

2. On approval by the administrative law judge, the Regional Office shall assume the responsibility for transmission of the stipulation and the required number of documents making up the formal record (see sec. 10172.5) to the Division of Operations Management, which will in turn submit the stipulation directly to the Board for its approval.

3. In the event an administrative law judge disapproves a settlement stipulation, or approves a unilateral settlement stipulation, the General Counsel's representative (or any other aggrieved party) may ask for leave to appeal to the Board as set forth in Section 101.9(d)(2) of the Statements of Procedure and Section 102.26 of the Rules and Regulations.

10164.7 *Parties:* Normally, the charging party is a party to the formal settlement agreement. However, an agreement that fully remedies all unfair labor practices should be accepted—subject of course to approval by the General Counsel and the Board—whether or not the charging party acquiesces. (Cf. *Marine Engineers' Beneficial Assn. No. 13 (Taylor & Anderson) v. NLRB*, 202 F.2d 546 (3d Cir. 1953); *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).)

With respect to the treatment of interested parties, see section 10134.

10166 *Elements*

10166.1 *Disposition of Allegations:* A formal settlement stipulation provides for the disposition of all allegations of the complaint, so that the complaint and stipulation conform. Thus, if a complaint has already issued, all allegations not covered by the stipulation are disposed of by withdrawal or dismissal, and the Regional Director's order reflecting such action is included in the stipulated record. The settlement stipulation may provide for dismissal of allegations. In consolidated cases the stipulation may provide for severance of allegations if the circumstances so require. If a complaint is to issue concurrently with the settlement, all allegations therein are disposed of in the stipulation.

10166.2 *Overall Content of Stipulation:* In addition to its remedial provisions, the stipulation contains a recital of jurisdictional facts; a waiver of formal hearing and further proceedings; an enumeration of the documents and pleadings that constitute the entire record; a recital of facts that are not apparent from the pleadings; an express consent to the entry by the Board of an order in conformity with the stipulation without further notice; where appropriate, an express consent to the entry by an appropriate United States Court of Appeals of a judgment enforcing the order; a statement that the entire agreement between the parties is contained in the stipulation; and a statement that the settlement is subject to the approval of the Board.

10166.3 *Jurisdictional Facts:* Formal settlement stipulations recite commerce facts sufficient to support an assertion of jurisdiction under the Board's current standards. An admission that the Board has jurisdiction of the respondent's operations is not sufficient; the stipulation must recite the essential facts from which the Board and the court may determine the relationship of the business of the respondent to commerce and its effect thereon. Where gross volume of business is the sole test for asserting jurisdiction, the settlement stipulation should include commerce data on inflow or outflow sufficient to establish statutory jurisdiction.

10166.4 *Waiver of Further Proceedings:* Formal settlement stipulations include a waiver of further proceedings and formal hearing in the matter.

10166.5 *Contents of the Record:* The parties should agree on and list the documents in the record: the stipulation; the charge and amendments; the complaint and notice of hearing (and affidavits of service if the facts of service have not been set forth in the stipulation); the answer, if any, and if not previously withdrawn; the order of severance if consolidated complaint had issued and severance occurred; and any letter, document, or affidavit disposing of the rights of other interested parties (sec. 10134). Hearing transcripts should not be incorporated as part of the record. One of the principal reasons for the limiting of the instruments to be included in the record is the cost of preparation of the record for the appellate court upon the filing of a petition for enforcement.

10166.6 *Facts:* Under Section 10(c), a Board order must be based on the preponderance of the testimony. Except where the respondent has stipulated to the entry of a court judgment, it is necessary that there be "testimony," in one form or another, to support the order. Therefore, either in the pleadings or the stipulation, the *facts* of the unfair labor practice involved must be clearly set forth. Allegations in the complaint, either undenied or expressly admitted, may fill this requirement. If they do not, the facts must expressly be set forth in the stipulation itself. Where there is some question as to the clarity of the facts as they appear in the pleadings, all doubts should be resolved in favor of insisting that they be inserted in the stipulation.

Certain factual elements *must* be included in the stipulation whether or not they can be gleaned from the pleadings. Jurisdictional facts should be included (sec. 10166.3). Also, in a stipulation calling for a bargaining order, the document should include a description of the appropriate bargaining unit and an agreement that the union involved represents a majority of the employees therein.

10166.7 *Consent to Board Order:* Within the stipulation, the parties must consent to the entry of a Board order without further notice. The terms of the order must be set forth with exactitude, and, since the Board, if it acts at all, must act in conformity with the stipulation, there should be no deviation from standard Board language.

EXCEPTION: It is permissible on insistence of a party to substitute "shall not" for "shall cease and desist from," with corresponding grammatical changes.

10166.8 *Consent to Court Judgment:* Self-explanatory. See paragraph 10 of Pattern for Formal Settlement of CA Case, section 10168.

10168 *Pattern 60, Settlement Stipulation in CA Case*

IT IS HEREBY STIPULATED AND AGREED by and between ABC Company (the Respondent), XYZ Union (the Union), Mutual Benefit Society (the Intervenor), and the General Counsel of the National Labor Relations Board, that:

1. Upon a charge filed by the Union on June 1, 19__, and served on the Respondent on June 4, 19__, an amended charge filed on June 8, 19__, and a second amended charge filed on June 15, 19__, and served on the Respondent on June 15, 19__, receipt of which charges is hereby acknowledged by the Respondent, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (the Board), by the Regional Director for Region 30, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Board's Rules and Regulations, issued a complaint against the Respondent

on June 18, 19__, together with a notice of hearing thereon. True copies of the aforesaid complaint and notice of hearing were duly served by registered mail on the Respondent, the Intervenor, and the Union on June 18, 19__, receipt of which hereby acknowledged by all parties.

2. The Respondent is a Delaware corporation maintaining its principal office in New York, New York, and operating a plant at Columbia, Alabama (the facility herein involved), herein called the Columbia plant, where it is engaged in the manufacture, sale, and distribution of furniture.

   Respondent, in the conduct of its business operations at the Columbia plant during the 1-year period ending June 30, 19__, its operations during said period being representative of its operations at all times material herein, purchased raw materials consisting principally of lumber, of a value in excess of $1.5 million more than 50 percent of which was purchased directly from business concerns located outside the State of Alabama, and was shipped by such concerns from points outside the State of Alabama directly to the Respondent at the Columbia plant. During the same period the Respondent, at the Columbia plant, manufactured and sold finished products of a value in excess of $1 million more than 20 percent of which, in value, was sold and shipped to customers outside the State of Alabama.

   Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

4. All parties hereto waive the filing of answer, hearing, administrative law judge's decisions, the filing of exceptions and briefs, oral argument before the Board, the making of findings of fact or conclusions of law by the Board, and all further and other proceedings to which the parties may be entitled under the Act or the Board's Rules and Regulations.

5. This stipulation, together with the charge, amended charge, second amended charge, and complaint and notice of hearing [include

affidavits of service of charge, amended charge, second amended charge, and complaint and notice of hearing if the service of these documents and their receipt by the parties has not been set forth in the stipulation; also include the answer if the Respondent or the Intervenor insists] shall constitute the entire record herein.

6. [When appropriate.] All employees of the Respondent at the Columbia plant, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. [When appropriate.] On or about May 1, 19__, a majority of the employees in the unit described in paragraph 6 above designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent. At all times since said date, the Union has been the representative of a majority of the employees in the aforesaid unit, and, by virtue of Section 9(a) of the Act, it has been and is now the exclusive representative for the purposes of collective bargaining of all employees in said unit.

8. [When there is no provision for entry of a court judgment.] The Respondent admits the allegations contained in paragraphs ____________ of the complaint herein.

9. Upon this stipulation and the record herein as described in paragraph 5 hereof, and without any further notice of proceedings herein, the Board may enter an order forthwith providing as follows:

The Respondent, ABC Company, its officers, agents, successors, and assigns, shall

[8(a)(2)]

1. Cease and desist from:

(a) Dominating or interfering with the administration of Mutual Benefit Society, or dominating or interfering with the formation or administration of any other labor organization of its employees, and from contributing financial or other support to Mutual Benefit Society or to any other labor organization of its employees.

[8(a)(2)]

(b) Recognizing Mutual Benefit Society as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

[NOTE: If the case involves assistance only, and not domination, subparagraph (a) above should be omitted and the following inserted in lieu thereof:

> "Contributing support to Mutual Benefit Society or to any other labor organization of its employees."

and to subparagraph (b) there should be added the language:

> "unless and until said organization shall have been certified by the National Labor Relations Board as the exclusive representative of such employees."]

[NOTE: If the case involves a contract between the Respondent and the assisted or dominated organization, an additional provision will have to be added to the order to set aside the contract. See, e.g., *International Metal Products Co.*, 104 NLRB 1076 (1953).]

[8(a)(5)]

(c) Refusing to bargain collectively with XYZ Union as the exclusive representative of all its employees at the Columbia, Alabama, plant, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act.

[8(a)(3)]

(d) Discouraging membership in XYZ Union, or in any other labor organization, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment.

[8(a)(1)]

(e) [NOTE: Insert language covering specific 8(a)(1) violations alleged in complaint; likewise, the notice should be a restatement of the provisions of the order.]

In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist XYZ Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the said Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw all recognition from Mutual Benefit Society as representative of any of its employees for the purpose of dealing with the Respondent with respect to grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely disestablish Mutual Benefit Society as such representative.

[NOTE: If the case involves assistance only, and not domination, the language "and completely disestablish Mutual Benefit Society as such representative" should be omitted, and in its place should be added the language "unless and until said organization shall have been certified by the National Labor Relations Board as such representative."]

(b) [*Installment payments:* When the agreement provides for installment payments and the total amount of backpay has been compromised, every effort should be made to employ the language below. This provides a measure of protection in the event of nonpayment, dissolution, or bankruptcy and is especially necessary where installment payments are extended over a relatively lengthy period of time.]

Make whole the following employees for loss of pay suffered by reason of the discrimination against them, by payment to them of the amounts set forth opposite their respective names and at the times set forth in the schedule that follows. In consideration of timely payment of all but the final installment of the amounts due each employee in accordance with such schedule, plus interest, payment of said final installment is hereby waived; but if any installment other than the final installment is not paid on or before the date due, the full unpaid amount shall become immediately due and payable.

[Total amount calculated as due was $5,000: compromise amount agreed to is $4,000.]

SCHEDULE

Name of Employees	*Amt. Due and Date of Payment*			*Total*
	8/1/89	9/1/89	10/1/89	
J. Smith	$ 500.00	$ 500.00	$ 350.00	$1,350.00
M. Brown	900.00	900.00	325.00	2,125.00
S. Cohen	600.00	600.00	325.00	1,525.00
Totals	$2,000.00	$2,000.00	$1,000.00	$5,000.00

(Final Installment)

[8(a)(5)]

(c) Upon request, bargain collectively with XYZ Union as the exclusive representative of all its employees at its Columbia, Alabama, plant, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

[NOTE: When a refusal to bargain occurs during the certification year, the certification year should be extended to compensate for that period of time during which no good-faith collective bargaining was conducted due to the respondent's unlawful refusal to bargain (*Mar-Jac Poultry Co.*, 136 NLRB 785 (1962)). In cases involving refusals to bargain during the certification year, the bargaining order should conform to this provision and specifically extend the certification year for the appropriate period of time. For example, in *General Electric Co.*, 163 NLRB 198 (1967), the Board's order provided as follows:

> On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and if an understanding is reached, reduce it to writing and sign it. Regard the Union on resumption of bargaining and for [balance of year—number of months] thereafter as if the initial year of the certification has not expired.

In cases when there has been no bargaining during the certification year, the word "commencement" should be substituted for "resumption."]

[8(a)(3)]

(d) Offer to the following employees immediate and full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges:

[list]

(e) Expunge from our records any reference to the discharge(s) of [name of employee(s)], and notify said employee(s), in writing, that this was done, and take no action inconsistent therewith.

[8(a)(3)]

(f) Make whole the following employees for any loss of pay they may have suffered by reason of the [alleged] discrimination against them, by payment to them, of the amounts set opposite their respective names:

[list]

[8(a)(3)]

(g) Make whole the above-named employees for any additional loss of pay caused by the Respondent's failure to reinstate them in accordance with the provisions of this Order, within 10 days from the date of this Order, by payment to them of the respective amounts that they would have earned if properly reinstated, from the 11th day after the date of this Order to the date of a proper offer of reinstatement, less their net earnings during such period, said amounts to be computed on a quarterly basis.

(h) On request make available to the Board or its agents, for examination and copying, all payroll and other records necessary to a determination of the amounts of backpay due under paragraph(s) 2(d) [and] 2(f) this Order.

(i) Post at its Columbia, Alabama plant copies of the attached notice marked "Appendix A." [See sec. 10132.2 for caption that is to be put on the notice.] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[NOTE: In all CA and CB cases, where the company and union as correspondents have entered into a joint settlement agreement, the settlement should provide for additional posting by the respondent-company by inserting an additional paragraph after (i), as follows:]

Post at the same places and under the same conditions, as set forth above, copies of the attached notice to employees [or members] marked "Appendix B" as soon as they are forwarded by the Regional Director for Region 30.

(j) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

10. The United States Court of Appeals for any appropriate circuit may, on application by the Board, enter its judgment enforcing the order of the Board in the form set forth in paragraph 9 hereof. The Respondent waives all defenses to the entry of the judgment, including compliance with the order of the Board, and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words and figures set forth in paragraph 9 hereof. However, the Respondent shall be required to comply with the affirmative provisions of the Board's order after entry of the judgment only to the extent that it has not already done so.

[NOTE: If the stipulation contains no provision for a consent judgment, there must be an admission of the allegations of the complaint or a stipulation of facts showing the commission of unfair labor practices (see par. 8). Such an admission or stipulation is essential to enforcement of the Board order in the court of appeals in the event of the respondent's failure to comply.]

11. This stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, that varies, alters, or adds to it [except (this may appear only in those situations described in sec. 10130.6 and only in stipulations providing for court judgment) that it is understood that the signing of this stipulation by the Respondent does not constitute an admission that it has violated the Act].

12. This stipulation, together with the other documents constituting the record as described in paragraph 5 hereof, shall be filed with the Board. The stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. On the Board's approval of the stipulation, the

Respondent will immediately comply with the provisions of the order as set forth in paragraph 9 hereof.

Signed at ____________________
(city) (state)

______________, 19__
(date)

ABC Company

By

____
Harold Jones
President

____
(street)

____
(city and state)

Signed at ____________________
(city) (state)

______________, 19__
(date)

XYZ Union

By

____
James Johnston
International Representative

____
(street)

____
(city and state)

Signed at ______________________
(city) (state)

_______________, 19__
(date)

Mutual Benefit Society

By

____
Joseph Martin
President

____
(street)

____
(city and state)

Approval by the General Counsel recommended:

____

John Smith
Attorney, Region __________
National Labor Relations Board
[address]
[date]

Approved:

____

Office of the General Counsel
National Labor Relations Board
Washington, D.C. 20570

[date], 19__

Attach a copy of the notice to all employees to the stipulation and mark it "Appendix A." It should follow Board precedents and should be in line with the terms of the stipulated order. (See sec. 10132.)

10170 *Pattern for Settlement Stipulation in CB, CC, and CD Cases:* The above pattern for settlement stipulations in CA cases is generally applicable also to CB, CC, and CD cases. The only differences of substance between the CA pattern and the stipulation in CB, CC, and CD cases will be in the Board order as set forth in paragraph 9 of the form, and in the attached notice to employees. The commerce paragraph will, of course, have to be drafted to fit the facts of the particular cases. This portion of the stipulation can usually be taken directly from the commerce allegations of the complaint. For these reasons the entire stipulation form is not being incorporated here. The following redraft of paragraph 9, however, should be substituted in CB, CC, and CD cases for the corresponding paragraph in the settlement pattern for CA cases:

9. Upon this stipulation and the record as described in paragraph 5, above, and without any further notice of proceedings herein, the Board may forthwith enter an order providing as follows:

The Respondent, XYZ Union, its officers, agents, and representatives, shall

1. Cease and desist from

    (a) Restraining or coercing employees of ABC Company [or any other employer] in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

    (b) Restraining or coercing ABC Company [or any other employer] in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

    (c) Causing or attempting to cause ABC Company [or any other employer] to discriminate against any employees in regard to their hire or tenure of employment, or any term or condition of employment, in violation of Section 8(a)(3) of the Act, as amended.

    (d) Giving effect to paragraph(s)__________ of its contract with ABC Company.

(e) Refusing to bargain collectively with ABC Company on behalf of all employees of its Columbia, Alabama, plant, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act.

(f) Engaging in, or inducing or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining D Company or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require D Company, or any other person, to cease doing business with ABC Company.

(g) Engaging in, or inducing or encouraging any individual employed by ABC Company [or any other person engaged in commerce or in an industry affecting commerce] to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining the ABC Company [or any other person engaged in commerce or in an industry affecting commerce], where, in either case, an object thereof is forcing or requiring ABC Company to join ____________________ [or any other labor or employer organization].

(h) Engaging in, or inducing or encouraging any individual employed by ABC Company [or any other person engaged in commerce or in an industry affecting commerce] to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or threatening, coercing, or restraining ABC Company [or any other person engaged in commerce or in an industry affecting commerce], where, in either case, an object thereof is forcing or requiring ABC Company to enter into an agreement whereby ABC Company agrees to cease doing business with any other person.

(i) Engaging in, or inducing or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce except ABC Company, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or threatening, coercing, or restraining D Company or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union, or any other labor organization, as representative of any of the employees of ABC Company, unless and until such labor organization has been certified by the National Labor Relations Board as the representative of such employees.

(j) Engaging in, or inducing or encouraging any individual employed by ABC Company [or by any other person engaged in commerce or in an industry affecting commerce], to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company [or any other person engaged in commerce or in an industry affecting commerce], where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union as the representative of any employees of ABC Company in a bargaining unit covered by a certification issued on [date], in Case [number] to an organization other than XYZ Union.

(k) Requiring of employees covered by an agreement authorized under Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, the payment as a condition precedent to becoming members of XYZ Union of a fee in an amount that is excessive or discriminatory.

(l) Causing or attempting to cause ABC Company to pay or deliver, or to agree to pay or deliver, any money or other thing of value in the nature of an exaction for services that are not performed or not to be performed.

(m) Engaging in, or inducing or encouraging any individual employed by ABC Company [or by any other person engaged in commerce or in an industry affecting commerce], to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company [or any other person engaged in commerce or in an industry affecting commerce], where, in either case, an object thereof is forcing or requiring ABC Company to assign the work of [describe the work in dispute] to employees who are members of, or represented by, XYZ Union rather than to employees who are not members of, or represented by, XYZ Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Notify ABC Company, in writing, that it has withdrawn its objections to the said Company's employment of Joe Doaks and now requests the Company to reinstate Joe Doaks. Notify Joe Doaks, in writing, that it has so informed ABC Company.

   (b) Make whole Joe Doaks for any loss of pay suffered by reason of the [alleged] discrimination against him by payment to him of the amount of $__________.

(c) Make whole the said Joe Doaks for any additional loss of pay caused by the failure of the Respondent, within 10 days from the date of this Order, (1) to notify ABC Company in writing that it has withdrawn its objections to said Company's employment of the said Joe Doaks and requests the Company to reinstate him, or (2) to notify Joe Doaks, in writing, that it has so informed ABC Company; by payment to the said Joe Doaks of the amount that he would have earned if reinstated by ABC Company, from the 11th day after the date of this Order to date of the giving of the said notices by the Respondent to ABC Company and to the said Joe Doaks, less his net earnings during such period, said amounts to be computed on a quarterly basis.

(d) Bargain collectively, upon request, with ABC Company in regard to rates of pay, wages, hours of employment, or other terms and conditions of employment of all employees at the Columbia, Alabama plant of the said Company, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act.

(e) Post at its business office in Columbia, Alabama, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(f) Mail to the Regional Director for Region 30 signed copies of the said notice for posting, if ABC Company is willing, in the plant of ABC Company at Columbia, Alabama, in the places where notices to employees are customarily posted. Copies of said notice, on forms provided by the Regional Director for Region 30, after having been signed by the Respondent's representative, shall be forthwith returned to the Regional Director for such posting by ABC Company.

[NOTE: In all CA and CB cases, where the company and union as correspondents have entered into a joint settlement agreement, delete the words "if ABC Company is willing," in par. (f), above.]

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

10172 *Effectuation and Performance*

10172.1 *Generally:* Formal settlement stipulations may be arrived at before or after a complaint issues. If complaint has not issued, one issues in conjunction with the settlement.

If complaint has issued, settlement may be reached either before or after the opening of a hearing. If the former, an order shall be issued adjourning the hearing indefinitely. If the latter, the administrative law judge should be apprised of the facts, should be requested to adjourn the hearing temporarily for settlement discussions, and, on execution of the stipulation, should be requested to adjourn the hearing indefinitely.

10172.2 *Prior Authority:* Before entering into the stipulation, the General Counsel will make his/her recommendation to and procure the approval of the Regional Director, although there should be no provision on the face of the stipulation for approval of the Regional Director. The recommendation and approval may, if necessary, be telephonic, but, at one point or another, they should be reduced to writing.

10172.3 *Final Approval:* The Board agent negotiating the settlement should make clear that the settlement not only is subject to approval by the Board, but also is subject to approval by the General Counsel's office in Washington. Parties should be given copies of the stipulation as the time the Region's attorney signs it and at that time advised that they will be notified by the Regional Office of approval of the General Counsel, and the date thereof, so that they may accordingly conform their copies.

(Regional Offices will receive copies of the transmittal memorandum from the General Counsel to the Executive Secretary approving the settlement. This will obviate the necessity of the General Counsel's office in Washington mailing conformed copies to the Regional Office.)

10172.4 *Action Required on Execution:* If the stipulation calls for issuance of a complaint, for withdrawal of an answer, or for the filing of an answer admitting the allegations of the complaint, these acts should be taken at or about the time of execution.

10172.5 *Transmittal to Division of Operations Management:* Original and five copies of the transmittal memo and original and three copies of the executed stipulation should be submitted to the Division of Operations Management. The transmittal memo should give all details pertinent to the settlement, *especially calling attention to and explaining any deviations from established law or any unusual facts.*

The original and three copies each of the documents constituting the record in the case should be submitted with the settlement stipulation. If any of them have been introduced at a hearing interrupted by the settlement, they should be procured from the reporter immediately.

(The stipulation, and other documents making up the record, will be transmitted to the Board by the Division of Operations Management, with appropriate explanations.)

10172.6 *Compliance:* On approval by the Board, as signified by Board order, the Region will assist in compliance in accordance with usual procedures. (See Compliance.) However, where a consent judgment is provided for, the case is not closed until the judgment is entered, even though full compliance has been effected earlier (sec. 10772.1).

10174 *Nonapproval by Board:* If the stipulation is *not* approved by the Board, the case will resume its status as before the execution. An answer filed or withdrawn in connection with the settlement may by stipulation of the parties be withdrawn or refiled, respectively. Hearing dates should be reset. Or, of course, the stipulation may be revised for resubmission to the Board.

10200–10248 *CC, CD, CE, and CP Cases*

10200 *Generally:* Cases arising under Section 8(b)(4) and (7) and Section 8(e) are among the most complex under the Act. Besides, cases arising under these sections have statutory priority (sec. 11740).

Therefore special procedures and principles apply to CC cases, CD cases in which 10(l) injunctive relief is indicated, CE cases and CP cases, including petitions, filed under Sections 8(b)(7) and 9(c) of the Act, as well as charges affecting the disposition of such CP cases and petitions filed thereunder. They must be handled with utmost dispatch, even though the disposition of cases having lesser priority will be somewhat delayed. To expedite the processing of such cases, the Region should, at the time of filing of the charge, or immediately thereafter, request the charging party to submit promptly (normally within 24 hours) evidence in support of the charge.

10200.1 *Notification to Washington:* In CC, CD, CE, and CP cases, in the discretion of the Regional Director, Washington should be alerted concerning charges involving, for example, defense industries or installations, or cases of more than local interest. Insofar as possible, all such communications should contain the following information:

a. The identity of the unions, employer, and charging party

b. The situs of the dispute

c. Whether a work stoppage exists

d. Whether there has been a work assignment, and to whom

e. The type of work in dispute

f. Whether a contract covers the employees or the work in dispute

g. Whether a union has been certified

h. Information concerning voluntary adjustment

i. Regional recommendations with respect to 10(l) injunctive relief.

Whenever communications are used to apprise Washington of the filing of charges involving missile sites, etc., they should be addressed to the General Counsel, Attention: Associate General Counsel, Division of Advice.

10200.2 *Final Report and Request for Advice:* Whenever a statutory priority case is to be submitted for advice the request for advice should be submitted to Washington as soon as the Region has completed its investigation (within 72 hours absent unusual circumstances). Request for advice should contain a final report in which all facts are related and credibility questions resolved, together with a legal opinion and recommendations. Regional Directors should decide in all circumstances whether requests for advice should be submitted by memo or by teletype. Whenever requests for advice are submitted by teletype, they should be addressed to the Associate General Counsel in charge of the Division of Advice. When submitted in memo form, an original and seven copies of the "Request for Advice" are required (sec. 11756).

Washington requests for further information or followup on the investigation should be given the same priority as the initial investigation.

In CE and CC cases involving demands for 8(e) clauses, the report should set forth verbatim the contract language (if a written contract is involved) claimed to be a violation.

10200.3 *Action on Advice:* Injunctive action, if taken, will be handled by the Region. (See injunctive relief under Sec. 10(l), secs. 10230–10234.) Issuance of notice of 10(k) hearing in a CD case will be handled by the Region (sec. 10210.1). If and when issuance of complaint in a CC, CD (sec. 10214.1), CE, or CP (sec. 10240) is authorized or is contemplated, the issuance of the complaint and the formal proceeding will be handled by the Region in the same manner as other charges (see Formal Proceedings, secs. 10250–10452), except that when injunctive relief is sought the complaint in such cases shall be issued promptly, normally within 5 days of the filing of the injunction petition. Allegations in complaints will customarily utilize the language of the statute or the 10(l) petition. It is essential that complaint allegations involving violations of Section 8(b)(4) specify whether the violations are under Section 8(b)(4)(i) or (ii) or both.

10200.4 *Request for Hearing Date:* Once a determination has been made that the case is meritorious, and absent settlement or the existence of favorable circumstances warranting further settlement negotiations, the Region should issue complaint promptly. Request the Chief Administrative Law Judge to set the date for hearing to be held within 3 weeks from the date complaint issues. This procedure will apply to cases involving proceedings under Section 10(l) in which complaint will usually issue within 5 days after filing of a petition for injunctive relief, and to cases in which the Region recommends 10(j) relief to Washington.

10200.5 *Ancillary Proceedings:* Cases in which the Region recommends 10(j) relief should be accorded priority handling even though the General Counsel or the Board may ultimately decide that extraordinary relief should not be sought in the case.

In the event 10(j) relief is authorized by the Board and the hearing before an administrative law judge has opened, Regions will institute 10(j) proceedings immediately. If necessary, obtain a continuance of the unfair labor practice hearing to process the injunction proceeding before the court. (See Injunctive Relief Under Section 10(j), secs. 10310–10312.)

10206 *CC Cases Not Related to Section 8(e):* Clearance from the Division of Advice is not required for the dismissal, solicited withdrawal, or complaint in CC cases not related to Section 8(e), except in novel situations (sec. 11751.1). Unsolicited withdrawals need not be cleared even in novel situations (sec. 11751.1); nor is clearance required for settlements unless they fall within one of the categories specified in section 11751.2.

(For more detailed guidelines see G.C. Memo 73-82, pursuant to which, and except as specified therein, Regions are authorized to process and dispose of 8(b)(4)(D) charges and to seek 10(l) injunctions without prior Washington clearance.)

10208–10214 *CD Cases*

10208 *Generally:* The Act, in Section 10(k), provides that, on the filing of an 8(b)(4)(D) charge, the Board shall hear and determine the dispute involved, unless, within 10 days after the parties have been notified that the charge has been filed, they satisfy the Board that they have adjusted or have agreed on a method for voluntary adjustment of the dispute; and that, on the parties' compliance with any such voluntary adjustment of the dispute, the charge should be dismissed.

Where evidence is received that one of two competing unions has unequivocally disclaimed the work in dispute, it may be that there is no longer a jurisdictional dispute. The mere fact that employees represented by the disclaiming union continue to engage in conduct inconsistent with the disclaimer does not invalidate the disclaimer, provided that the employees are not fronting for the union and there is no evidence that the disclaimer is a sham. *Teamsters Local 85 (U.C. Moving)*, 236 NLRB 157 (1978). If the disclaimer is valid, the charge should be dismissed and the notice of 10(k) hearing quashed, if already issued.

Here, then, we have a number of features unique in the Act. A formal procedure *preliminary* to issuance of complaint is provided; the parties may, by specified action, effect a postponement or elimination of this preliminary formal procedure; and they may, by further specified voluntary action, effect a disposition of the entire proceeding.

10209 *Notice of Charge Filed:* In all CD cases, as soon as possible after the charge has been filed, the Region promptly serves a copy of the charge together with a copy of Notice of Charge Filed on all parties to the dispute. These include not only the respondent or respondents and the charging party or charging parties, but also the employer having control over the assignment of the work in dispute, if he is not a charging party, and other union or unions or the groups to which the work has been assigned, or which claim the work in dispute.

These last named parties are to be included in the caption of the case. The notice of charge filed as well as the charge shall be made part of the record in the 10(k) proceeding, if one is held.

10209.1 *Pattern for Notice of Charge Filed:*

[Case Caption]

NOTICE OF CHARGE FILED

PLEASE TAKE NOTICE that pursuant to Section 10(b) of the National Labor Relations Act, a Charge has been filed alleging the above-named labor organization, [Insert name of the respondent or respondents] has engaged in an unfair labor practice within the meaning of Section 8(b)4(D) of the Act. A copy of the Charge is attached hereto.

YOU ARE FURTHER NOTIFIED, pursuant to Section 10(k) of the Act, that, unless within 10 days after receipt of this Notice of Charge Filed the parties to the dispute alleged in said Charge submit to the undersigned satisfactory evidence that they have adjusted said dispute or have agreed on methods for the voluntary adjustment thereof, the Board is empowered and directed to hear and determine the dispute out of which the said unfair labor practice charge arose if it is determined that the said charge has merit.

IN WITNESS WHEREOF, the undersigned Regional Director has caused this Notice of Charge Filed to be signed at ______________ on this ______________ day of ______________ 19__.

____

Regional Director
National Labor Relations Board
Region ____

10210 *The 10(k) Hearing:* If it appears that the charge has merit, the Region should issue notice of 10(k) hearing, unless there is agreement by the parties on a method of voluntary adjustment of the dispute or unless there is an actual adjustment (sec. 10212). This hearing and determination are known as the 10(k) hearing and 10(k) determination, respectively, after the section of the Act providing for them.

In those instances where they are unable to absorb the additional workload, Regions may request the assistance of administrative law judges in the handling of the more complex 10(k) hearings. Requests for assistance should be submitted to the Region's Assistant General Counsel in the Division of Operations Management.

10210.1 *Notice of Hearing and Service:* Once a 10(k) hearing is deemed appropriate, the Region should promptly issue notice of hearing and serve it on all parties to the dispute, including all employers having control over the assignment of the work in the dispute, and the union or unions, or group or groups, to which the work has been assigned, or which claim the work.

The respondent or respondents and charging party or charging parties, as well as the employer having control over the assignment of the work in dispute, if he is not a charging party, and the union or unions or group or groups, to which the work has been assigned, or which claim the work, should be included in the caption of the case. In cases involving 10(l) injunctive relief, the notice of hearing should be issued normally within 5 days after such injunctive relief is first sought (see Sec. 102.90 of Rules and Regulations).

10210.2 *Scheduling of Hearing:*

a. Although Section 10(k) and the Board's Rules and Regulations (Sec. 102.90) permit the hearing in any 10(k) case to be set for the 11th day after service of the notice of charge filed, or any date thereafter, such hearings generally are to be scheduled for more than 10 days after service of the notice of hearing, not service of the notice of charge filed.

b. Authority to schedule the hearing for less than 11 days after service of the notice of hearing should be secured in advance from the Division of Operations Management, unless the parties are in agreement. Such authority should be sought in *all* missile site cases and may be sought in other cases involving the national defense and in other cases where special circumstances indicate that an expedited hearing would be in the public interest.

c. Even in cases where scheduling of the hearing on a date less than 11 days after service of notice of hearing is authorized, adequate notice to the parties of the hearing date must be allowed. This may vary depending on circumstances, such as the urgency of the matter, the positions of the parties, the complexities of the issues, and the time reasonably required to prepare for an adequate hearing. The circumstances should be reported to the Division of Operations Management when authority to schedule the hearing for an early date is sought, together with the date proposed.

10210.3 *National Defense Cases:* All 10(k) notices of hearing in cases involving missile or space sites are to contain the designation "This Case involves the National Defense" (see pattern in sec. 10210.8). Permission to designate other cases as "involving the National Defense" should be obtained from the Division of Operations Management.

Where the notice of hearing in a 10(k) proceeding designates the cases as "involving the National Defense," the Region is instructed to order expedited copy of the transcript of the hearing in order to hasten submission of the dispute to the Board for determination. In other 10(k) cases, not designated in the notice as involving the National Defense, the Regional Director may order expedited copy of the transcript on good cause shown.

10210.4 *Adjustment:* Should the parties, during the hearing, report to the hearing officer an agreed-on method of adjustment or an actual adjustment, the Hearing Officer should recess the hearing (see sec. 10212 for further regional action). If, however, there is an issue with respect to an alleged agreed-on method or actual adjustment, the hearing should continue and evidence on this issue should be taken during the course of that hearing.

Should an agreed-on method of adjustment or an actual adjustment be reported to the Regional Office after the close of the 10(k) hearing, the party or parties raising the issue should be instructed to direct such information to the Board through the Executive Secretary's office. Meanwhile, the Region should report the facts to the Board, through the Executive Secretary's office and to the Division of Operations Management for a consideration of further steps to be taken, if any.

10210.5 *Hearing Officers:* 10(k) hearings are usually conducted by a hearing officer from the Region involved in the same manner as hearings in R cases.

The text of Form 4669 should be adapted to the purposes of the 10(k) hearing and the entire adaptation read into the record. (See secs. 11180–11248.) The hearing officer should not be the same person who investigated the charge, who acted as attorney for the General Counsel in a companion CC case based on the same facts, or who may prosecute the CD unfair labor practice case that may arise thereafter.

While the parties bear the responsibility of supporting their respective contentions, the hearing officer should see that the Board gets a complete record, including evidence as to whether there exists reasonable cause to believe that the respondent has violated Section 8(b)(4)(D) of the Act.

Immediately upon the close of the hearing, the hearing officer should forward to the Executive Secretary's office an appearance sheet containing the names and addresses of all interested parties and Form NLRB-856 with the date on which the hearing closed and the due date for briefs entered so that any request/motion to the Board may be promptly processed.

10210.6 *Hearing Officer's Report:* As soon as possible after the close of a 10(k) hearing, the hearing officer should prepare and forward to the Executive Secretary of the Board a hearing officer's report (except in unusual and complicated cases, not later than 48 hours after the close of hearing). The report should set forth the issues and the evidence but should make no recommendations or findings. (This report is *not* served on the parties or counsel/representatives of record.)

10210.7 *Posthearing:* Posthearing procedures, including those applicable to briefs, should follow the procedures in sections 11258–11274, except that parties desiring to file briefs in cases designated as "involving the National Defense" must obtain leave to do so from the Board through the Office of the Executive Secretary.

10210.8 *Pattern for Notice of Hearing:*

[Case Caption]

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the ___ day of ________, 19__, at [hour and place], pursuant to Section 10(k) of the National Labor Relations Act, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board upon the dispute alleged in the Charge attached to the Notice of Charge Filed issued in this matter on the ___ day of ________, 19__. At said hearing, the parties will have the right to appear in person or otherwise and give testimony.

> The dispute concerns the assignment of the following work task(s):
>
> [When authorized as a case involving the national defense, insert "THIS CASE INVOLVES THE NATIONAL DEFENSE."]

IN WITNESS WHEREOF, the undersigned Regional Director, on behalf of the Board, has caused this Notice of Hearing to be signed at ________________ on this ________________ day of ________________, 19__.

____

Regional Director
National Labor Relations Board
Region ___

10212 *Voluntary Adjustment*

10212.1 *Method of Voluntary Adjustment; Actual Adjustment:* If the parties to a dispute either (a) agree on a method of voluntary adjustment of the dispute or (b) actually adjust the dispute, the course of a CD case, depending on all the circumstances, may be materially altered.

Both the *existence* of one or the other—the distinction between the two is extremely important—and the timing of the event must be closely scrutinized. The following are set forth as lines of investigative guidance:

10212.2 *Agreed-on Method of Voluntary Adjustment:* An agreed-on method of voluntary adjustment exists when the parties to the dispute have agreed to be bound, or in fact are bound, by an arrangement for the resolution of the dispute.

Examples are membership or acquiescence in the program administered by the Impartial Jurisdictional Disputes Board (G.C. Memo 73–82), a stipulation to submit the dispute to an arbitrator, a *consent* Board representation proceeding, or any other such arrangement.

10212.3 *Parties to Agreement: All* parties to the dispute must be parties to the agreed-on method of adjustment. Thus, the employer, as well as the union disputants, must be bound by the arrangement before it is considered an agreed-on method of voluntary adjustment within the meaning of this section. If an agreed-on method for voluntary adjustment results in a determination that the employees represented by a charged union are entitled to perform the work in dispute, the Regional Director shall dismiss the charge as to that union irrespective of whether the employer has complied with the determination.

10212.4 *Procedure; Voluntary Adjustment:* Upon a satisfactory showing of the existence of an agreed-on method of voluntary adjustment prior to the issuance of a 10(k) notice of hearing, the Region should normally postpone issuance of the notice, while retaining the charge in its pending status. If the notice has issued but the hearing has not yet opened, the notice should normally be withdrawn; here again the charge remains pending. If the 10(k) hearing is in progress (and is recessed—see sec. 10210.4), the notice should normally be withdrawn; the charge again remains pending. If the hearing is closed (and the parties have approached the Board directly—see sec. 10210.4), the Regional Director may communicate his/her regional position to the Board; at any rate future action will be based in part on such action as is taken by the Board.

At whatever stage the existence of an agreed-on method of voluntary adjustment is reported, subsequent developments—such as the issuance of a decision or award, an actual adjustment, a "breakdown" of the agreed-on method—should also be reported to the Office of the Executive Secretary as may be appropriate. The Division of Advice need not be notified unless the 10(k) notice of hearing was issued pursuant to advice.

10212.5 *Actual Adjustment:*

a. An *actual adjustment* exists when the parties in fact "settle" the dispute—for example, by reaching full agreement thereon or when an agreed-on method of voluntary adjustment culminates in a decision or award that resolves the dispute, with which settlement agreement, decision, or award the charged party is complying.

b. On a satisfactory showing of the existence of an actual adjustment prior to the issuance of a notice of 10(k) hearing, the charge (absent withdrawal) should normally be dismissed. At any time between the issuance of the notice and the close of the hearing, the charge (absent withdrawal) will normally be dismissed. If the hearing is closed and the parties have approached the Board directly (see sec. 10210.4), the Regional Director may communicate his/her regional position to the Board; at any rate future action will be based in part on such action as is taken by the Board.

10212.6 *Unsolicited Withdrawal Request:* Nothing in section 10212 should be construed as prohibiting the approval of an unsolicited withdrawal request submitted in connection with a satisfactory showing of an agreed-on method of adjustment or an actual adjustment, *if such showing* is made prior to the closing of the 10(k) hearing, see section 10210.4.

10213 *Impartial Jurisdictional Disputes Board:* One of the more common methods of voluntary adjustments of disputes covered by CD charges involves submission of the dispute to the Impartial Jurisdictional Disputes Board, which, effective June 1, 1973, succeeded the National Joint Board for the Settlement of Jurisdictional Disputes (see G.C. Memo 73-82).

If the parties to a CD charge are eligible for participation in the plan, the Regional Director should invite their attention to it. (They may procure information and stipulation forms from the Chairman, Impartial Jurisdictional Disputes Board, 815 16th Street, N.W., Washington, D.C. 20006.)

For a discussion as to who is bound to the Disputes Board see G.C. Memo 73–82.

10214 *Compliance with 10(k) Determination or Voluntary Adjustment Award:* On issuance of the 10(k) determination by the Board, the Region should ascertain whether the charged party is complying. If it is, the charge should be dismissed with the usual right of appeal, unless it is withdrawn.

10214.1 *Noncompliance:* If the charged party is *not* complying with a 10(k) determination, or with a decision or award made pursuant to an agreed-on method of voluntary adjustment, issuance of a complaint will follow. However, if the determination is that employees represented by the charged union are entitled to perform the work in dispute, the Regional Director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

10216–10218 *CE Cases*

10216 *Generally:* The unfair labor practice under Section 8(e) runs against both employers and unions, although the charge may be filed against either an employer or a union or both. The allegation should specify whether the contract involved is expressed or implied, in writing, oral, or otherwise, the date on which the contract was entered into, and the parties thereto.

Note particularly the provisions of section 10040.4 with respect to service of a copy of the charge on parties other than the charging party and the party charged; a party to the contract involved in a CE case should be served with a copy of the charge even though no charge has been filed against it.

A violation of Section 8(e) is not established unless there is shown to be in existence either an express or implied agreement to cease doing business with another person or to cease handling the products of another employer.

Injunctive relief procedures in CE cases are the same as those employed in CC cases (see sec. 10230).

10218 *Settlements:* In 8(e) cases, settlements provide that the charged party (parties) shall cease giving effect to, or attempting to enforce, that part of the contract that contravenes the limitations of Section 8(e) of the Act. In addition, no settlement shall be approved where only one of the contracting parties is charged unless the party not charged shall:

a. Be a party or signatory to the agreement itself or

b. File with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement.

Pattern for settlement stipulation (sec. 10168) is generally applicable to CE cases except for paragraph 9 (notice language).

Although the violation under Section 8(e) is entering into the prohibited contract, the language in the settlement notice provides that the respondent employer and/or union will cease maintaining, giving effect to, or enforcing the 8(e) contract or agreement. It is suggested that the notice be patterned after issued Board decisions.

10230–10234 *Injunctive Relief Under Section 10(l)*

10230 *Injunctive Relief in CC, CE, and CP Cases:* Where there is reasonable cause to believe that a violation has occurred and that a complaint should issue in CC, CE, and CP cases, Section 10(l) of the Act authorizes injunctive relief.

Under that section, injunction proceedings are mandatory; however, if it appears that the union has voluntarily ceased engaging in the conduct and a resumption thereof is not threatened, so that there may be nothing to enjoin, commencement of 10(l) proceedings may be held in abeyance, as our experience in the courts has demonstrated that they are unwilling to accept filings where the activity has ceased and there is no likelihood of resumption. In the latter event, injunction proceedings should be instituted if it thereafter appears that a resumption of the conduct is imminent or likely.

When a determination has been made that a charge subject to the injunction procedure of Section 10(l) has merit and the charged conduct is continuing, or, if discontinued, resumption thereof is threatened, the Regional Office should without delay determine whether the respondent will cease or refrain from engaging in the unlawful conduct and, absent prompt acquiescence with that demand, 10(l) proceedings should be instituted without further delay. Although settlement negotiations may be warranted prior to the institution of 10(l) proceedings, such negotiations should be summary in nature, and injunction proceedings should not be deferred when such negotiations become protracted or are unreasonably delayed.

On filing of a petition for 10(l) injunctive relief, complaint should issue promptly—normally within 5 days after filing of the 10(l) petition. A hearing date within 3 weeks from the date the complaint issued should be requested from the Chief Administrative Law Judge.

In preparation for 10(l) injunction proceedings, any portion of the investigation may be dispensed with in the Regional Director's discretion (see Sec. 101.4, Statements of Procedure).

The Division of Advice will be available to assist the Regions either where unusual circumstances, such as a heavy 10(l) docket, may preclude the timely handling of injunction proceedings, or the national scope or significance of the dispute may make Division of Advice handling more appropriate. The Division of Advice will be prepared to render procedural and substantive advice in the preparation and trial of 10(l) cases.

In any 10(l) case, where the court makes the order to show cause returnable at any unduly late date, consideration should be given as to the advisability of applying for a temporary restraining order, even though, had an early hearing date been set, no application for a temporary restraining order would have been made. In such situations, Regional Directors are authorized to act on requests for temporary restraining orders and to apply for temporary orders without Washington clearance.

Whenever it appears that the court is inclined to make the order to show cause returnable at a later date, it should be reminded of the congressional policy relating to Section 10(l) and the emergency nature of proceedings under that section.

In all cases where 10(l) injunctive relief is being sought, Regions should assure the court that the General Counsel will make every effort to expedite the proceedings before the Board and will oppose any unwarranted attempt by any party to delay the Board proceedings. Likewise, in every case where 10(l) injunctive relief has been obtained or is being sought, Regions should so inform (a) the Chief Administrative Law Judge when scheduling the hearing; (b) the assigned administrative law judge at the hearing on the record; and (c) the Board in the brief filed with it. At each stage, Regions will respectfully request that the case be processed expeditiously pursuant to Sections 102.95–102.97 of the Board's Rules and Regulations.

On filing of petition for injunctive relief, the complaint should be issued promptly, normally within 5 days.

In circumstances where an injunction has been secured, but the charges are subsequently dismissed, the injunction should remain in effect until the time to appeal has expired or, if an appeal is taken, until there has been a final determination of that appeal. (See also sec. 10122.5.)

Appeals from the district courts to the courts of appeals will be handled by the Division of Advice.

Copies of decisions and orders issued by the court in 10(l) proceedings should be forwarded to the Division of Advice in all cases where complaint was authorized by the Division of Advice and in all cases where the Region deems the court decision or order of particular significance.

Whenever requested injunctive relief is denied in all or in part, the Division of Advice should be notified promptly and a copy of the court's decision or order, if any, should be forwarded to the division, together with the Region's recommendation as to whether an appeal should be taken.

Copies of notices of appeal or other papers served on the Regional Office in connection with an appeal from the court's decision in a 10(l) proceeding should be promptly forwarded to the Division of Advice, except after the Office of the General Counsel has entered an appearance in the matter and it is clear from the affidavit of service or other documents that the Office of the General Counsel has already been served with such papers.

Whenever it is charged or it appears that an injunction order is being violated, the Division of Advice should be promptly notified, and after its investigation the Region should submit to the division its recommendation on whether contempt proceedings are warranted.

10232 *Injunctive Relief in CD Cases:* Application for a 10(l) injunction in a CD case is not mandatory. The Act provides for injunctive relief in CD cases when "appropriate." (See G.C. Memo 73–82, pages 18–21, for discussion of discretionary 10(l) injunction in CD cases.)

The injunction procedure is the same as that employed in CC cases.

The criteria used in connection with 10(l) action are not the same as those used in connection with 10(j) action. (See secs. 10310–10312.)

10234 *Temporary Restraining Order:* The Act permits application for a temporary restraining order without notice only if "substantial and irreparable" injury *to the charging party* will be "unavoidable" before a hearing. For guidance see G.C. Memo 75–18 Authorization of Regional Directors to Process Without Clearance Requests and Applications for Temporary Restraining Orders in Section 10(l) Proceedings—Guide for Processing.

10240–10248 *8(b)(7) Cases*

10240 *Authorizations, 8(b)(7) Cases:* Regional Directors are authorized to issue complaints, dismiss charges, or accept solicited withdrawals in cases arising under Section 8(b)(7) without clearance from the Division of Advice except in novel situations (sec. 11751.1). Except as noted in section 10244.1, unsolicited withdrawals need not be cleared even in novel situations (sec. 11751.1), nor is clearance required for settlements unless they fall within one of the categories specified in section 11751.2.

10240.1 *Washington Consultation:* Regions should not hesitate to consult with the Division of Advice, by telephone when necessary, about questions that may arise during the processing of a case without regard to whether the case has been submitted for advice.

Similarly, such consultation or advice should be sought from the Division of Advice with respect to injunction proceedings relating to 8(b)(7) cases.

10240.2 *Cases of Special Interest:* The Division of Operations Management should be alerted concerning charges involving defense, missile, or space sites or other cases of more than local interest because of widespread publicity by the press or because the matter is likely to become the subject of outside inquiries addressed to Washington (secs. 10200.1 and 11751.1).

10241 *Request for Advice or Clearance:* A case may be submitted for advice or clearance by teletype or memo addressed to the appropriate Washington division.

The case file should be forwarded to Washington immediately with a copy of the teletype or the original and seven copies of the "Request for Advice" memo, as appropriate (sec. 11756).

10241.1 *Situations Likely to Present Novel Issues Warranting Submission for Advice:*

a. *Picketing*

   1. Those unusual cases where traditional indicia of picketing are absent; e.g., no patrolling, no picket signs or "handbilling."

   2. Those cases in which, apart from a sign importing organizational or recognitional object, all the evidence indicates that the picketing is not for such an object.

b. *8(b)(7)(A)*

   1. Those cases where the lawfully recognized union disclaims representative status.

   2. Those cases where a QCR arguably cannot be raised for reasons other than contract bar.

c. *8(b)(7)(C)*

1. Those cases (a) involving issues of "abandonment" of representative status and (b) those involving the prior *unlawful* recognition of the picketing union.
2. Those cases involving a determination of what constitutes a "reasonable period of time" for picketing without a petition being filed, except for those cases governed by the Board's *Eastern Camera* principle (141 NLRB 991, 997 (1963)).
3. Those cases where a petition is timely filed but is for an inappropriate unit or does not include the employees the picketing union is seeking.
4. Those cases where an expedited election would be warranted but the union ceases picketing—particularly where the picketing is for a brief period of time—and unequivocally disclaims interest in the employees.
5. Those cases that raise a substantial question as to whether a picket sign is within the second proviso.
6. Those cases that raise a substantial question as to whether the proviso picket sign is "truthful."
7. Those cases where the picketed premises are so located as to raise a presumption that any picketing could not have the purpose of advising the public or consumers.
8. Those cases that raise unusual "proviso effect" issues.

10242 *Investigation:* It is expected that CP charges be fully investigated within 72 hours after the filing of the charge.

The unfair labor practice elements of the case are within the province of the General Counsel, and any representation case elements are within the province of the Board. An application under Section 10(l) for injunctive relief must be made on a determination that an 8(b)(7) complaint shall issue. However, a valid 8(a)(2) charge will preclude any proceedings for an injunction. Therefore, if, at any time during the pendency of an 8(b)(7) charge, an 8(a)(2) charge is filed, it must be investigated immediately and its merits determined.

If it is determined that on the basis of the investigation there is no merit to an 8(a)(2) charge, 10(l) proceedings are not to be instituted until the charge has actually been dismissed.

Once the 8(a)(2) charge is dismissed by the Regional Director, if the charging party does not immediately take an appeal and the circumstances require immediate application for injunctive relief, the Regional Director need not wait until the time to file the appeal expires before instituting 10(l) proceedings. If an appeal is taken, whether before or after commencement of the 10(l) proceedings, the Region should immediately communicate with the Division of Advice for joint consideration of the course of action to be followed in the particular case.

In many cases a representation petition will be filed at or about the same time as the CP charge is filed, which will involve the employees of the employer named in the charge. The charge should be fully investigated first, and the complete investigation of the petition should await a judgment as to the merits of the charge as noted above. (Of course, many of the elements to be determined in the investigation of the charge are relevant to the petition also, so that to some extent the elements common to both will be developed concurrently.)

(See sec. 10244.2 re petitions filed concurrently with or after commencement of picketing but no CP charge is on file.)

Where a representation petition and a related CP charge are pending, the charge should be investigated to determine:

a. Whether picketing or threats of picketing have been conducted for a proscribed object.

b. Whether subparagraphs (A) and (B) of Section 8(b)(7) are inapplicable and whether subparagraph (C), exclusive of the second proviso, is applicable.

c. Whether the petition has been filed within a reasonable time from the commencement of the picketing.

Unless all of the above factors are present, utilization of the expedited procedure is unwarranted.

The investigation should not be limited to the factors specified but all the evidence available that is related to the subject of the charge and the petition should be developed and reported. Care must be exercised to give the respondent union an opportunity to present its evidence and its position relating to the merits of the charge.

In addition to the 8(a)(2) charges referred to above, any charge that may block an election must likewise be investigated expeditiously, and the merits of such charge should be determined at the earliest possible moment.

If the petition is found to constitute a defense to conduct that would otherwise constitute a violation, no complaint issues and the petition is handled under the expedited procedure. In either event, the action of the General Counsel on the charge can, under the *Times Square Stores* doctrine (79 NLRB 361 (1948)), be treated as disposing of the questions concerning whether the special procedure is applicable.

The requirement that an election "effectuate the purposes of the Act" may be construed to permit the denial of the expedited procedure where, among other things, its use may be viewed as a circumvention of the procedures of Section 9(c)(1).

If prior to the dismissal of a representation petition, because of the petitioner's failure to furnish evidence required under Section 9(c)(1), an 8(b)(7)(C) charge is filed, the procedures with respect to related concurrent representation and 8(b)(7)(C) cases will apply.

10244 *Dispositions Without Hearing*

10244.1 *Dismissals*

a. *Dismissal of Charge:* This action of the General Counsel in connection with the unfair labor practice case may be dispositive of various issues that the Board may have to consider in a related representation case. A specific statement of the grounds for dismissal should be served on the filing party.

1. When the Regional Director does not find a violation of Section 8(b)(7) or does not find that a complaint is warranted, Pattern 70 letter (sec. 10248.1) should be followed.

2. When the Regional Director finds that issuance of an 8(b)(7)(C) complaint may be warranted except for the pendency of a petition filed within a "reasonable time," the charge, unless withdrawn, shall be dismissed forthwith on issuance of the direction of election, and such dismissal shall not operate as a stay of the election. Follow Pattern 71 letter for dismissal of such charges (sec. 10248.2); note particularly that an appeal should be filed within 3 days—instead of 10—from the date of service of the dismissal letter.

b. *Dismissal of Petition:* In many instances, concurrently with or soon after the commencement of picketing, a representation petition will be filed, and there will be no CP charge on file. If the petition is of the usual type, it should be processed in the normal way. If the petitioner claims an exemption from the requirements of Section 9(c)(1) because of the picketing and expresses the desire for an expedited election, the petitioner should be informed that, absent the pendency of a CP charge, the expedited procedure is not available and an opportunity should be given the petitioner to furnish the necessary evidence to sustain the usual petition. (See Pattern 72 letter, sec. 10248.3.) If the petitioner does not furnish such evidence in compliance with the requirements of Section 9(c)(1), the petition should be dismissed, absent withdrawal. A dismissal of a petition in these instances is without prejudice. (If, prior to the dismissal of the petition, a CP charge is filed and investigation thereof reveals that an expedited election would be proper, the case should be processed accordingly.)

There is no right of appeal from dismissal of petitions filed pursuant to Section 102.76 of the Rules and Regulations in order to invoke the expedited election procedure, except by special permission of the Board (see Pattern 73 letter, sec. 10248.4). Special care must, therefore, be taken by the Regional Director in exercising delegated power and authority in this regard.

10244.2 *Settlement of CP Cases:* The scope of a remedy to be sought in settlement agreement will vary with the circumstances surrounding the violations. In any event, a remedy that merely requires cessation of conduct in the statutory language may not be sufficient to effectuate the policies of the Act. Following are some proposed provisions that may be used as a basis for discussion in settlement negotiations.

Remedy Cease and desist from

[Under 8(b)(7) violations] threatening to picket ["threatening" not in 8(b)(7)(C) order] [name of employer]

- or -

picketing or causing to be picketed [name of employer]

- or both -

[with an object of] forcing or requiring [name of employer] to recognize or bargain with Respondent as the representative of its employees, forcing or requiring the employees of [name of employer] to accept or select Respondent as their collective-bargaining representative,

- or both -

unless Respondent is certified as the representative of such employees where

[Under (A)] [name of employer] has lawfully recognized another labor organization in accordance with the National Labor Relations Act, and a question concerning representation may not be appropriately raised under Section 9(c) of said Act.

[Under (B)] within the preceding 12 months a valid election has been conducted under Section 9(c) of the National Labor Relations Act among the employees of [name of employer].

[Under (C)] such picketing is conducted without a valid petition under Section 9(c) of the National Labor Relations Act involving the employees of [name of employer] having been filed within a reasonable time after the commencement of such picketing, not to exceed 30 days. [Where a conclusion has been reached in a particular case that some specific period of time, less than 30 days is a "reasonable time," the insertion of such specific number of days may be more appropriate.]

On approval of the settlement, respondent union should be informed by letter that the terms of the settlement contemplate the cessation of picketing for recognitional or organizational object during the settlement's posting period. To prevent any misunderstanding, the letter should expressly inform the parties that this prohibition applies to picketing, during the posting period, with picket signs in terms of the second proviso to Section 8(b)(7)(C) of the Act.

10244.3 *Special Election Procedure Under Section 8(b)(7):* Provision has been made for any representation petition, RC, RD, or RM, to be processed under the special procedure. The requirements for a showing of interest and claim of recognition are dispensed with, however, in accordance with the terms of Section 8(b)(7)(C).

Special representation procedures under Section 8(b)(7) are conditioned on the filing of an 8(b)(7) or CP charge. The expedited procedure, which includes a provision for a prehearing election in appropriate cases, can be resorted to only if there is picketing for an object proscribed by Section 8(b)(7), a charge under that section is filed, and it is first determined that the picketing does not already violate subparagraph (A) or (B) of that section. In short, the expedited procedure may be utilized only where the filing of a representation petition may constitute a defense to picketing that is otherwise violative of Section 8(b)(7)(C).

The established doctrine that a free choice cannot be expressed by employees in the face of unremedied unfair labor practices also applies to elections under the expedited procedure. Accordingly, charges involving such alleged unfair labor practices must be disposed of before an expedited election can be held.

If the Regional Director determines that an election is warranted, he/she shall direct that an election be held in an appropriate unit of employees. The basis of eligibility of voters and the place, date, and hours of balloting shall be fixed by the Regional Director. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding.

(The parties may enter into a consent-election agreement under Sec. 102.79 of the Rules and Regulations.)

Procedures, other than those mentioned above, for the conduct of the election and the postelection proceedings are the same as in regular

"R" cases except that the Regional Director's rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants special permission to appeal from the Regional Director's rulings.

Although the expedited procedure contemplates prehearing elections in most cases, provision has been made for a hearing prior to an election where issues have been raised that the Regional Director believes should be decided before any election is conducted (sec. 10246).

10246 *Notice of Hearing in R Case:* Where a determination has been made that an "expedited" petition should be processed but novel or complex issues are involved, the Regional Director has the authority under the rules to set the case down for hearing on such issues prior to directing an election.

A hearing is to be directed only where it is deemed necessary to resolve certain questions prior to an election, particularly the question concerning the unit in which the election is to be conducted. Any other issue, relating to the propriety of processing under the expedited procedure, as for instance, whether the picketing was conducted for a proscribed object, or whether the petition was timely filed, or whether subparagraphs (A) or (B) are applicable, are not to be deemed within the compass of the issues which may be specified for hearing. Where such a hearing is directed, action on the CP charge is to be deferred pending the decision of the Regional Director, or the Board as the case may be, in the representation case.

Pattern 75 (sec. 10248.6) is a hearing notice designed to meet the special requirements of a situation that involves Section 8(b)(7)(C). Where there is more than one petition involved in the situation, use Pattern 76, Order Consolidating Cases and Notice of Representation Hearing (sec. 10248.7).

10247 *Typical Situations:* Following is a list of various typical situations that may arise with a brief statement respecting the appropriate procedure. In all the hypothetical situations it is assumed that picketing has been conducted for an object proscribed by Section 8(b)(7) in circumstances in which subparagraphs (A) and (B) are inapplicable, and no question of *bona fides* or circumvention exists.

	Situation	*Procedure*
a.	Timely RC, RD, or RM petition filed; no showing of interest or claim of recognition present. Employer or any person files 8(b)(7) charge while petition is pending.	Expedited election procedure applicable. When election directed, charge dismissed. (Charging party is allowed 7 days to file appeal. See Rules, Sec. 102.81(a).)
b.	Timely RC, RD, or RM petition filed; no showing of interest or claim of recognition present.	Since there is no 8(b)(7) charge, expedited election procedure inapplicable, processing of petition in normal way required. As necessary proof to sustain petition is lacking, dismissal of petition is warranted. If, before petition is dismissed, an 8(b)(7) charge is filed, expedited procedure is to be invoked.
c.	After dismissal of petition as in situation b, above, second timely petition filed. Employer or any person files 8(b)(7) charge.	Expedited election procedure applicable; charge will be dismissed when election is directed.
d.	Employer or any person files 8(b)(7) charge. No petition is filed.	Charge should be investigated in normal way. If investigation shows "reasonable time" has elapsed, charge should be processed.
e.	Employer or any person files 8(b)(7) charge. Untimely petition is filed.	Expedited procedure inapplicable; charge should be processed. Petition processed in normal way. If no proper proof submitted to sustain petition, it must be dismissed; if proof submitted, regular 9(c)(1) proceedings are warranted, but this does not stay processing of charge.

f.	CA, CB, CC, CD, or CE charge *directly related* to 8(b)(7) situation is dismissed.	Dismissal letter Pattern 1 (sec. 10122.8) sent. Seven-day appeal period given. (See Rules, Sec. 102.81(a).)

10248 *Patterns Designed to Meet Special Requirements of 8(b)(7) Cases:*

Pattern 70	Dismissal of Charge (No Direction of Election)
Pattern 71	Dismissal of Charge (With Direction of Election)
Pattern 72	Refusal to Process Under Expedited Procedure (and of intention to process under provisions of Sec. 9(c)(1))
Pattern 73	Dismissal of Petition
Pattern 74	Regional Director's Direction of Election
Pattern 75	Representation Hearing (8(b)(7)(C))
Pattern 76	Order Consolidating Cases and Notice of Representation Hearing

10248.1 *Pattern 70, Dismissal of Charge (No Direction of Election):* Charging party is allowed the usual 10 days to file appeal.

[Charging Party]

Re: [Name of Respondent]
Case [number]

Dear Sir:

The above-captioned case charging a violation under Section 8(b)(7) of the National Labor Relations Act has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as—

> there is insufficient evidence that there was picketing of, or a threat to picket, an employer;
>
> there is insufficient evidence that there was picketing of, or a threat to picket, an employer for an object proscribed by Section 8(b)(7) of the Act;
>
> it appears that the picketing or threat thereof described in the charge was engaged in by a labor organization that is currently certified pursuant to Section 9(c) of said Act;
>
> there is insufficient evidence that picketing was conducted for an unreasonable time within the meaning of Section 8(b)(7)(C) of the said Act;
>
> it appears that the picketing that has been alleged in the charge is privileged under the second proviso to Section 8(b)(7)(C) of the Act;
>
> there is insufficient evidence that the picketing or the threat(s) of picketing occurred under circumstances that violate Section 8(b)(7)(A) or (B) of the Act.

I am therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570, and a copy with me. The appeal must contain a complete statement setting forth the facts and reasons on which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on [month-day-year]. On good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

____

Regional Director

cc: General Counsel
Respondent(s)
Address(es)

10248.2 *Pattern 71, Dismissal of Charge (With Direction of Election):* Charging party must file appeal within 7 days of service of letter to be timely. (See Rules, Sec. 102.81(a).) (See sec. 11840.4 for computation of date.)

[Charging Party]

Re: [Name of Respondent]
Case [number]

Gentlemen:

Dear Sir:

The above-captioned case charging a violation under Section 8(b)(7) of the National Labor Relations Act has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as a timely valid representation petition involving the employees of the employer named in the charge has been filed within a reasonable time from the commencement of the picketing described in said charge, and a determination has been made that an expedited election should be conducted on such petition in accordance with the provisions of Sections 8(b)(7)(C) and 9(c) of said Act and the National Labor Relations Board Rules and Regulations. A notice of such election is being issued in Case [number].

I am therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570 and a copy with me. The appeal must contain a complete statement setting forth the facts and reasons on which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on [month-day-year]. Such appeal shall not operate as a stay to any action by the Regional Director.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

____
Regional Director

cc: Other parties
General Counsel
Attorney(s) or Representative(s) of record

10248.3 *Pattern 72, Refusal to Process Under Expedited Procedure:*

[Petitioner]

Re: [Name of Employer]
Case [number]

Dear Sir:

The above-captioned case, arising from a petition filed pursuant to Section 9(c) and a charge filed pursuant to Section 8(b)(7) of the National Labor Relations Act, has been carefully investigated and considered.

It does not appear that expedited procedures pursuant to said section of the Act are warranted inasmuch as

> the petition has not been filed within a reasonable time after the commencement of picketing of the employer named in the petition, a reasonable time having been determined in the current circumstances to be ____ days.
>
> [Other reason.]

I am therefore declining to process the petition under said expedited procedures and am proceeding to process the petition in accordance with the provisions of Section 9(c)(1) of the National Labor Relations Act and of Subpart C of the National Labor Relations Board Rules and Regulations.

If you have not already done so, furnish evidence that

> A substantial number of employees wish to be represented by the petitioner for the purposes of collective bargaining.
>
> A substantial number of employees do not desire to be represented for collective-bargaining purposes by the labor organization (individual) currently certified (recognized).
>
> A labor organization or individual has presented a claim to the petitioner to be recognized as the representative of the petitioner's employees as defined in Section 9(a) of the Act.

Unless such evidence is submitted promptly, the petition will be dismissed.

Very truly yours,

____

Regional Director

cc: Other parties
The Board

10248.4 *Pattern 73, Dismissal of Petition:*

Petitioner

Petitioner's representative

Re: [Name of Employer]
Case [number]

Dear Sir:

The above-captioned case, arising from a petition filed pursuant to Section 9(c) and a charge filed pursuant to Section 8(b)(7) of the National Labor Relations Act, has been carefully investigated and considered.

It does not appear that further proceedings are warranted inasmuch as I have determined that there is reasonable cause to believe that the picketing described in the charge in Case [number] is violative of Section 8(b)(7)(A) and (B) of the Act. Based on my decision to issue an unfair labor practice complaint in that matter, no question concerning representation can be raised at this time.

I am therefore dismissing the petition in this matter.

(The dismissal letter should inform the parties of the right to obtain review (under Sec. 102.71 of the Rules) by filing a request with the Board in Washington. The letter should also advise the petitioner that the R case dismissed is subject to reinstatement, if appropriate, on the petitioner's application after disposition of the ULP proceeding. To assure notification to the petitioner of the disposition of the ULP proceeding, the petitioner, if not a party to the ULP proceeding, should be considered a party in interest in the ULP proceeding with an

10248.5 *Pattern 74, Regional Director's Direction of Election:*

Petitioner

Employer

Unions

Re: [Name of Employer]
Case [number]

Dear Sir:

On the basis of the investigation made to date in the above matter, it appears appropriate now to conduct an election by secret ballot to determine whether or not the employees of [name of employer] in the unit of employees described below wish to be represented for purposes of collective bargaining by [name of union] or [name of other interested unions] pursuant to Section 9(c) of the National Labor Relations Act, or by no union.

Accordingly, pursuant to Sections 8(b)(7)(C) and 9(c) of the Act, and Section 102.77 of the National Labor Relations Board Rules and Regulations, an election by secret ballot will be conducted, as provided in the enclosed Notice of Election, among the employees of the above-named employer in a unit described as follows, which is hereby found to be appropriate:

[Description of Unit]

Additional copies of the Notice of Election are being herewith furnished the employer for posting in conspicuous places throughout the plant [or other premises].

Your cooperation will be appreciated.

Very truly yours,

Regional Director

10248.6 *Pattern 75, Representation Hearing (8(b)(7)(C)):*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Name of Party]

and Case [number]

[Name of Party]

NOTICE OF REPRESENTATION HEARING

The Petitioner, above named, having heretofore filed a petition pursuant to Section 9(c) of the National Labor Relations Act, copy of which petition is hereto attached, and it appearing that, pursuant to said section and to Section 8(b)(7)(C) of the Act, a question affecting commerce has arisen concerning whether the employees described by such petition desire a collective-bargaining representative as defined in Section 9(a) of the Act, and concerning the unit in which an election may appropriately be conducted to resolve such question.

YOU ARE HEREBY NOTIFIED that, pursuant to Section 9(c) of the Act, and the National Labor Relations Board Rules and Regulations, on the ____________ day of ____________, 19__, at ______, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board on the aforesaid question, at which time and place the parties will have the right to appear in person or otherwise and give testimony.

IN WITNESS WHEREOF, the undersigned has signed this Notice of Representation Hearing on this ____ day of ________, 19__.

____

Regional Director
National Labor Relations Board

____

(Address)

10248.7 *Pattern 76, Order Consolidating Cases and Notice of Representation Hearing:*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Name of Party]

and Case [number]

[Name of Party]

[Name of Party]

and Case [number]

[Name of Party]

ORDER CONSOLIDATING CASES AND NOTICE OF REPRESENTATION HEARING

Petitions, pursuant to Section 9(c) of the National Labor Relations Act, having been filed by [name of party] in Case [number]; by [name of party] in Case [number]; copies of which petitions (or amended petitions) are hereto attached; and a charge having been filed under Section 8(b)(7)(C) of the Act; and the undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay.

IT IS HEREBY ORDERED, pursuant to Section 102.82 of the National Labor Relations Board Rules and Regulations, that these cases be, and they hereby are, consolidated.

It further appearing that questions affecting commerce have arisen concerning whether the employees described by said petitions desire a collective-bargaining representative as defined in Section 9(a) of said Act, and concerning the unit in which an election may be conducted to resolve such questions.

YOU ARE HEREBY NOTIFIED that, pursuant to Section 9(c) of said Act and Section 102.77 of the National Labor Relations Board Rules and

Regulations, on the ___ day of _______, 19__, at _____ in _____ the _______, a hearing will be conducted on the aforesaid questions at which time and place the parties will have the right to appear in person or otherwise and give testimony.

IN WITNESS WHEREOF, the undersigned has signed this Order Consolidating Cases and Notice of Representation Hearing on this ___ day of _______, 19__.

____
Regional Director
National Labor Relations Board
____
(Address)

10250–10452 *Formal Proceedings*

10250 *Generally:* (If charge is partially dismissed, see sec. 10122.5 for permissible action if dismissal is appealed.) After a decision has been made that unfair labor practices have been committed, and that a complaint should issue, the case becomes the responsibility of the attorney to whom it is assigned (the trial attorney). The trial attorney is charged with:

a. Preparation of the complaint

b. Preparation of the General Counsel's pretrial motions and of opposition, if any, to the pretrial motions of other parties

c. Preparation of the case for trial

d. Trial of the case as the representative of the General Counsel

e. Making of oral argument to the administrative law judge where appropriate

f. Preparation and filing with the administrative law judge of a brief, where appropriate

g. Filing with the Board of exceptions to and/or a brief in support of the administrative law judge's decision, where appropriate

It is the responsibility of the trial attorney to be aware of and to call to the attention of his superior any circumstances that might have an effect, one way or the other, on the case. (E.g., Availability of new or unavailability of old witnesses; the discovery of new evidence or of legal theories not previously considered.) If new developments warrant it—at any point—the trial attorney, through his superior, should initiate appropriate regional action, through a regional committee meeting or otherwise.

10252–10258 *Precomplaint Action*

10252 *Further Investigation:* Such steps should be taken prior to the issuance of complaint as may have been specified at the time the decision to issue was made. The steps should be taken by the examiner or trial attorney, as designated.

In the absence of instructions to the contrary, provided that careful scrutiny of the contents of the case file supports the recital of facts on the basis of which the issuance of complaint was decided, precomplaint interviews of witnesses by the trial attorney are not necessary. An exception may be made where the case depends entirely on the credibility of one or more witnesses whose testimony is contradicted by other witnesses. In such situations, the trial attorney may interview witnesses before issuance of the complaint with respect to factual conflicts (sec. 10060).

Investigative subpoenas (i.e., subpoenas returnable prior to hearing) should not be requested or issued subsequent to decision to issue complaint, unless clearance from the Division of Operations Management has been procured (but see sec. 11770).

10254 *Settlement Attempts:* Unless in a given case the conclusions of the regional committee dictate the contrary, the Board agent assigned to make initial settlement efforts should notify the charged party of the regional determination before issuing complaint. He/she should specifically note that the matter can be disposed of by voluntary agreement and should offer his/her services in working out a satisfactory settlement that will effectuate the purposes of the Act. Further settlement attempts, if any, should be along lines indicated in section 10126, and, in connection with the type of settlement to be sought, see section 10140.

10256 *Conformity of Charges and Complaints:* The trial attorney must be alert to see that there are no critical variances between the allegations of the charge and the allegations of the complaint and where necessary make appropriate amendments. As evidence of violations outside the scope of the last amended charge (either because of substance or because they occurred subsequent to the last amendment) reveals itself, the trial attorney must take steps in the direction of correcting the situation (sec. 10064).

Normally, the complaint should conform to all allegations of the last amended charge that have not been disposed of by other means. It is recognized that the complaint may have to be broader than the charge on occasion (e.g., where, over objections of the charging party, a union-security clause isbeing attacked (sec. 10064.7)) but the attempt to procure amendment should have been made; in any event, the charge must be broad enough, as a matter of law, to support the allegations of the complaint.

10257 *Parties Derivatively Liable for Remedying Unfair Labor Practices:* When the investigation or events subsequent to the regional determination, such as existence of an alter ego, successor, individual, or trustee in bankruptcy, disclose that unnamed parties should be alleged in the complaint as derivatively liable for remedying the alleged unfair labor practices, an amendment to the charge should be sought to reflect derivative liability and the complaint should so allege (see secs. 10064, 10505, 10528.16, and 10643).

10258 *Procurement of Hearing Date:* A specific hearing date, normally within 30 days of the date issuance of complaint is contemplated, should be requested from the Division of Judges (see sec. 10122.5) if there has been a partial dismissal of the charge. The Region's representative may choose to consult with the respondent's counsel in order to arrive at a mutually satisfactory date; however, it should be made clear that any understanding is only tentative, and subject to confirmation by the Division of Judges.

Complete hearing request information (Clerical Procedures Manual, sec. 12045.1–12045.5). Requests for hearing dates should normally be made by telephone. (Where arrangements are completed by telephone, hearing request memo duplicating that information need not be sent to the Division of Judges.)

Requests to the Washington office should be made to the staff assistant to the Chief Administrative Law Judge. The staff assistant is responsible for all requests for hearing dates, postponements, cancellations, adjustments, and any other actions affecting the Washington office trial calendar.

Similar requests by Regions assigned judges by our San Francisco, New York, or Atlanta Judge's Divisions should be directed to the respective presiding judge.

Several cases may be set for hearing, on a "calendar call" basis, at the same place, date, and hour. This is generally feasible where the cases are ready for hearing at or about the same time, where they are to be tried in the same area (within 30 or 40 miles of each other), and where each will probably not consume more than 4 days of hearing. (The shortest will be called first, the next shortest second.) The request to the Division of Judges should specify that there will be a calendar call and should give the probable duration of each case. The parties in each case should be apprised of the fact that this is a calendar call.

10258.1 *Estimated Length of Hearing:* Concurrent with the request for hearing date (Clerical Procedures Manual, sec. 12045.1), the Region is required to submit to the Division of Judges an estimate of the length of hearing. Normally, during the week immediately preceding the scheduled hearing, the Division of Judges will request an updated estimate.

Updated estimates given to the Division of Judges should not merely be based on a cursory examination of the pleadings. Regional attorneys should consult with their trial attorneys to ascertain in each case how many witnesses will be called and the estimated length of their testimony and cross-examination. Sufficient detail regarding the estimate of the time to be expended in defending the case should be secured from the respondent's counsel.

If the regional attorney should fail to secure such detailed information from the respondent, in making his/her estimate he/she must rely on the Region's experience with a particular defense counsel, noting how extended or brief his/her defense has been in past similar cases, and the number and nature of subpoenas, if any, that have been requested by the respondent.

10258.2 *Hearing Space; Procurement and Space:* Whenever possible, the Regional Office hearing room should be used. When a courtroom or other hearing space is obtained in the field, it should be checked to assure that it is the best space available. Ideally, an unfair labor practice hearing should be conducted in a courtroom that usually has auxiliary witness and conference rooms. Absent the availability of a courtroom, a formal hearing room that reflects the dignity and decorum of administrative proceedings of the Government is acceptable. If space proves inadequate or the accommodations are poor, notify the official responsible for securing hearing rooms and, if possible, notify him/her of the location and availability of more suitable hearing space.

At the hearing, the conduct of the parties should be dignified, both on and off the record. Building property should not be misused. Special effort should be made to prevent incidents that might jeopardize future use of courtrooms or other space secured for the hearing. Smoking should not be permitted while the hearing is in session and, in or out of the session, the normal building rules as to smoking must be observed.

10258.3 *Hearing Date for Summary Judgment Cases:* Whenever a motion for summary judgment is filed in a case scheduled for hearing before an administrative law judge, the Division of Judges should be requested to withdraw the hearing date from its calendar. In the event the motion is denied, a new date will be assigned.

10260–10276 *Complaint*

10260 *Generally:* The culmination of the informal, or nonpublic, investigation is the complaint. Its issuance marks the substitution of a formal allegation of law violation in the name of the United States Government for a charge by a "person." Moreover, it constitutes the exercise of the final authority conferred on the General Counsel with respect to the issuance of complaints (Sec. 3(d) of the Act).

Hence, care must be exercised so that the pleading is not only well founded legally but is well drafted.

The preparation of the complaint begins, as a practical matter, at the moment of assignment of an attorney to a case. He should, at all times, think in terms of provable allegations of law violations. If time and circumstances permit him to have a rough draft prepared by the time of the regional committee meeting in a case, so much the better; items decided to constitute triable violations can then and there be ticked off or added to the draft. At any rate, the time immediately following a regional committee decision to issue complaint should be occupied in perfecting the allegations.

Ideally, the complaint should be ready for issuance within a few days of the decision to issue. The final draft of the complaint (with a draft of the explanatory memorandum that is to be sent to the Division of Operations Management on issuance of the complaint, sec. 10272) should be transmitted to the regional attorney for review before being signed by the Regional Director and served on the parties. A complaint alleging a violation of either Section 8(b)(4)(A), (B), or (C), Section 8(b)(7), Section 8(e), or Section 8(b)(4)(D) (which involves 10(l) injunctive relief) should be issued promptly, normally within 5 days of the date on which such injunctive relief is first sought (see Sec. 102.96 of Rules and Regulations).

The form, contents, and service of complaint and related matters are discussed in sections 10262–10272.

10262 *Form of Complaint:* The complaint is a formal document issued for the General Counsel by the Regional Director on behalf of the Board. Bearing the case caption, it sets forth the facts on which the Board bases its jurisdiction and the facts relating to the alleged violations by the respondent(s). Guidance in terms of drafting should be sought from the National Labor Relations Board Pleadings Manual, Complaint Forms.

The complaint should *contain* a notice of hearing (sec. 10267), and the actual title of the document should be "COMPLAINT AND NOTICE OF HEARING."

A sample of the opening paragraph is set forth in the Pleadings Manual.

This is followed by numbered paragraphs each devoted to a single phase of the case. The first paragraph recites the facts of filing and of service of the original and of each amended charge. The normal complaint next contains a recital of jurisdictional facts, the identity and nature of the parties, a chronology of events, other applicable factual information, additional necessary factual or legal conclusions (e.g., in a refusal-to-bargain charge, a description of the bargaining unit), and the appropriate designation of the foregoing as violative of one or another section of the Act. Allegations in complaints involving violations of Section 8(b)(4) customarily utilize the language of the statute or the 10(l) petition. The same practice should be followed with respect to 8(e) complaints. It is essential that complaint allegations involving violations of Section 8(b)(4) specify whether the violations are under Section 8(b)(4)(i) or (ii), or both.

Following allegations of specific violations, the complaint should allege that the "acts of the respondent(s) described above constitute unfair labor practices affecting commerce within the meaning of Section 8 [repeating all sections alleged to have been violated in preceding paragraphs] and Section 2(6) and (7) of the Act."

Where appropriate the complaint should contain an appropriate "prayer for relief." Indeed, whenever any other than a routine remedy is sought, the earlier it is requested the better. Absent countervailing considerations, it should be set forth in the complaint if it has previously been determined. Otherwise, the remedy may be specified in the opening or closing statements or in the brief. However, the earlier the issue is raised, the less likely it is to cause delay and, to that end, it is advisable to raise the issue at an early point following the determination to seek an unusual remedy.

The (unnumbered) notice of hearing (sec. 10267) next follows. Finally, the document is dated and is executed by the Regional Director involved.

10264 *Parties:* The caption as well as the body should name not only the respondent(s) but the charging party. Whenever the legality of a contract is put in issue, the name of any party to the contract should also be included. In the caption, this person should be labeled "party to the contract."

Particular care should be taken to name as parties all liable entities in a joint-employer or *alter ego* situation. If a contract or a recognition is being attacked (e.g., a dominated or assisted union), the names of the parties to the contract or the parties to the recognition agreement should be included in the caption of the complaint. (See Pleadings Manual, section 100.1(a).) In the event a remedy is sought against an employer seeking reinstatement of an employee in the context of a CB complaint where no charge is filed against the employer, the employer must be named as a party in interest in the complaint, a prayer for remedial relief requesting reinstatement must be set forth in the complaint, and the employer must be served with a copy of the complaint and all other pleadings and documents. See *Teamsters Local 227 (American Bakeries)*, 236 NLRB 656 (1978).

These constitute parties for purposes of the caption. For parties to be served with complaint, see section 10270.

10266 *Particularity:* The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met. For example, an 8(a)(1) or 8(b)(1)(A) allegation should specify the names of offending supervisors or union agents, with the dates and locations of each incident. Names of alleged discriminatees and dates of the allegedly discriminatory acts should be set forth. The date of a refusal to bargain should be noted, as well as the description of the bargaining unit and the fact of majority designation. In other words, a complaint should be "bill-of-particulars proof" (sec. 10292.1).

Careful draftsmanship of the original formal papers, or amendment of complaint when such amendment becomes necessary in the interest of accuracy or clarification, avoids many problems not only in the trial of the case, but obviates the necessity of vexatious and time-consuming briefs and arguments throughout the entire course of the litigation process. Examples of difficulties encountered because complaints were either improperly drawn or amended at the wrong stage of the proceeding may be found in *Herald Statesman v. NLRB*, 417 F.2d 1259 (2d Cir. 1969); *Meat Cutters (Tyson's Foods) v. NLRB*, 420 F.2d 148 (D.C. Cir. 1969); *NLRB v. Dennison Mfg. Co.*, 419 F.2d 1080 (1st Cir. 1969).

10266.1 *Strike Situations:* In cases involving an unfair labor practice accompanied by a strike in protest thereof, the General Counsel should plead and litigate the nature of the strike in addition to the primary unfair labor practice issue. The General Counsel should also seek an open-end order requiring the reinstatement, on application therefor, of all qualified strikers. If the alleged violation is bottomed on a claim that a strike originated as, or was subsequently changed to, an unfair labor practice strike, specific details as to the acts resulting in the inception or conversion should be pleaded.

This is also for the purpose of eliciting admissions and eliminating the necessity for proof (e.g., the respondent may admit the *fact* of discharge, but not the *reason* therefor).

However, see section 10282.1 regarding discretion of the Regional Director not to plead and litigate the nature of the strike where the complaint alleges a technical 8(a)(5) violation.

10266.2 *Discriminatees:* Names of employees alleged to be the objects of 8(a)(1) or 8(b)(1)(A) conduct need *not* appear in the complaint. Also, "and others" may be used to describe those among a group of alleged discriminatees whose names are unknown at the time of issuance of complaint (but the description must be specific enough to enable the respondent to know what group is involved; and, whenever the names become known, they should be added by amendment). Finally, conduct that is to be relied on as "background" material but with respect to which unfair labor practice findings will not be sought need not be alleged.

10266.3 *Unlawful Union-Security Arrangement:* If a union-security arrangement is being attacked, the details of the arrangement should be set forth in the complaint; if the arrangement takes the form of a written agreement, a paraphrase of the affected clause(s) is sufficient.

10266.4 *Unlawful Fees, Dues, or Assessments:* In cases where initiation fees, dues, or assessments have been unlawfully collected (i.e., where "refunding," either by employer, union, or both, is an appropriate remedy), the facts that such collections were made and that they were made "pursuant to the [contract, agreement, arrangement, or practice, whichever applies] described in paragraph(s) ________" should be specifically alleged. (*N.B.:* Although only a *practice* without a contract is involved, the advisability for this allegation should not be overlooked.)

10267 *Notice of Hearing:* In a C case, the notice of hearing is merged with and contained in the complaint. After the last *numbered* allegation therein will appear the following:

> PLEASE TAKE NOTICE that on the ___ day of _________, 19__, at [hour and place] a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.
>
> You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said complaint within 10 days from the

> service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately on the filing of its answer, the Respondent shall serve a copy thereof on each of the other parties.

Notices of hearing may subsequently be amended by separate order, even though they originally were part of the complaint.

10268 *Attachments:* It is not necessary to attach copies of charge or amendments to the complaint, but the facts of filing and of service should be recited in the complaint (sec. 10262). One copy of Form NLRB-4668 should be attached to each copy of the complaint and notice of hearing served on the parties.

Orders consolidating cases, where called for, may be separately issued or, with appropriate change of title, may be incorporated in the complaint and notice of hearing.

10268.1 *Related Instructions:* Accompanying the complaint and original notice of hearing, but not as an attachment thereto, should be Form NLRB-4338, that gives (a) notice that it is still possible to settle the matter by agreement; (b) instructions for requesting postponements (sec. 10294); and (c) names and addresses of all parties served.

10269 *Cases Involving Sections 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2), and 8(a)(4) or any Case Involving Backpay Remedy:* During the initial investigation of a charge, when the case appears to have merit, the Board agent should inquire of each discriminatee concerning interim earnings, search for work, and gross backpay and place this information in the file for use in settlement efforts.

The attorney who prepares the complaint should compile and insert in the file a list of the names, addresses, and social security numbers of the alleged discriminatees. In preparing this list, the attorney may utilize the information previously gathered during the course of the investigation (sec. 10056.3).

At the time a complaint is issued, a copy of the complaint along with the list of discriminatees' information should be sent to the compliance officer who is responsible for furnishing each alleged discriminatee with the following NLRB forms:

NLRB-4288	Information on Backpay for Employees
NLRB-4685	Notification of Change of Address
NLRB-5224	Claimant Expenses and Search for Work Report

The discriminatee should be asked to fill in Form NLRB-5224 and return it to the compliance officer. The compliance officer must make certain that such forms are received from each alleged discriminatee and placed in the case file for future use. Additionally, the compliance officer should request formally at this time that each discriminatee maintain records of interim earnings/expenses and search for work and submit that information to the compliance officer on a regular basis. Form NLRB-5230 (Interim Earnings Report) and Form NLRB-5224 (Claimant Expenses and Search for Work) may be used for this purpose. The compliance officer is responsible for receiving this information from each discriminatee and for placing the information in the case file for future use.

10270 *Service of Complaint:* The complaint and notice of hearing should be served by registered mail, as soon as possible prior to the hearing but, in any case, at least 14 days before the date set for hearing. (See Secs. 102.15 and 102.111–102.114 of Rules and Regulations.)

Before complaint issues, the trial attorney should prepare a list of all persons to be served, with their post office addresses, using Hearing and Service Sheet, Form NLRB-857. He/She is responsible for the accuracy of the list and should indicate those representatives or attorneys who have submitted "Notice of Appearance."

The respondent, the charging party, any employer or labor organization that is party to a contract the legality of which is being put in issue, a recognized labor organization whose bargaining status is at issue, and any allegedly assisted or dominated labor organization should be served.

In an 8(b)(4)(D) case (sec. 10210.1) each labor organization involved in the "jurisdictional dispute," whether or not named as respondent, should be served.

Where it appears advisable to notify parties other than those listed above (e.g., person(s) involved in an 8(b)(4)(A) case other than the respondent and the charging party), copies should be sent them.

10272 *Notice to Washington:* In all cases, a copy of the complaint should be forwarded to the Division of Operations Management immediately on issuance (see Clerical Procedures Manual, sec. 12045.13). Where issued pursuant to regional determination, the transmittal memorandum should set forth:

a. The actual settlement efforts; when the settlement effort was made, by whom, and the reasons why settlement was not forthcoming

b. The basis for issuance of complaint

c. The material facts

d. The issues involved

e. The applicable legal theories with supporting case citations

f. Anticipated trial problems

The memorandum should be a self-contained document and to the extent possible should avoid conclusionary statements of fact.

Where complaint issues pursuant to Washington authorization, the transmittal memorandum should not contain the specific information set forth above unless the pleadings in the complaint are of such a nature as to warrant further explication. If issued pursuant to action of the General Counsel on appeal or pursuant to Washington advice, the transmittal memorandum should note this fact.

Alternatively, in lieu of a transmittal memorandum, the Region may choose to submit the final investigation report or equivalent document.

10274 *Amendments to Complaint:* A complaint may be amended at any time prior to issuance of an order by the Board (Sec. 102.17, Rules and Regulations).

10274.1 *Prehearing Amendment:* Prior to the opening of the hearing, the complaint may be amended by the Regional Director who issued the complaint. Drafted by the trial attorney, the new document should take the form of an "amendment to" the complaint setting forth the desired changes, unless the amendment changes are extensive in scope, in which case there should be an "amended complaint" setting forth the full, changed allegations. Where appropriate (e.g., where the opening of the hearing is imminent, where it is believed that the forthwith issuance of the amendment will be the occasion for a postponement request, and where in fact no one will be prejudiced thereby), the parties may be served (sec. 10270) with *notice* that at the hearing a motion to amend the complaint will be made, the details of the contemplated motion being set forth in the notice.

In addition to being served with such notice the respondent, through counsel, should be advised by telephone of the intention to amend the complaint at the hearing.

(With respect to continuances necessitated by prehearing amendments, see sec. 10294.)

10274.2 *Amendment at Hearing:* During the hearing, a complaint may be amended on motion made to and granted by the administrative law judge. The motion may be written or stated orally on the record. The amended complaint may be a newly written one; may, with the administrative law judge's permission, consist of interlineations on the face of the original or last amended complaint; or may merely be stated for the record. One of the circumstances warranting consideration in connection with amending a complaint at the hearing is whether or not a continuance will thereby be necessitated (secs. 10406 and 10406.2).

Where a strike has ensued or been prolonged by conversion from an economic to an unfair labor practice strike, the General Counsel should move to amend the complaint by the inclusion of relevant allegations. This may be done either during the hearing or after close of hearing. If the administrative law judge denies the General Counsel's motion to amend at the hearing or to amend and reopen the hearing, an intermediate appeal should be taken to the Board rather than raising the matter by exception to the administrative law judge's decision (sec. 10404).

If an attempt to amend a complaint is based, to any extent, on an amended charge filed at a hearing, a copy of the amended charge should be served on each party, the original and one copy should be introduced into the record, and two copies forwarded to the Regional Director for docketing.

10274.3 *Amendment After Hearing:* Prior to transfer to the Board from the administrative law judge, any amendment should be submitted to the administrative law judge, in writing, as part of a motion to amend. After the transfer, it should be submitted to the Board.

10274.4 *Amendment as to Parties Derivatively Liable for Remedying the Alleged Unfair Labor Practices:* When events subsequent to the issuance of complaint disclose the existence of an alter ego, successor, individual, trustee in bankruptcy, or other party, which should be alleged as derivatively liable for remedying the alleged unfair labor practices, the complaint should be amended to allege such derivative liability (see secs. 10027, 10064.6, 10505, 10528.16, and 10643).

10274.5 *Service and Notice to Washington:* As in the case of original complaints (sec. 10270), copies of amendments should be served on the parties. Service at hearings should be personal and should be noted and acknowledged on the record.

As in the case of original complaints (sec. 10272), notification of substantial amendments, with explanations, should be sent to the Division of Operations Management.

10275 *Withdrawal of Complaint*

10275.1 *Withdrawal of Complaint Prior to Hearing:* A complaint may be withdrawn before the hearing by the Regional Director on his/her own or on any party's motion.

On a prehearing discovery of lack of merit, if the charging party will not withdraw its charge, the complaint should be withdrawn by an order that includes a dismissal of the charge and instructions for appealing the action (but see sec. 10275.2).

In all cases of actual withdrawal (or dismissal) of complaint, memorandum or notification and justification (or explanation), together with a copy of any withdrawal (or dismissal) order, should be sent to the Division of Operations Management.

If an informal settlement agreement is entered into by all parties, withdrawal of the complaint should be part of the agreement (sec.

10148.3). On an approvable request for withdrawal of the charge (sec. 10276), the complaint should be dismissed by an order that includes approval of the withdrawal request.

Such orders issued by the Regional Director prior to hearing should include withdrawal of the notice of hearing.

(On the execution of a *formal* settlement agreement at this stage, the complaint is neither withdrawn nor dismissed. See secs. 10164–10174.)

10275.2 *Protested Withdrawal of Complaint:* With respect to partial withdrawal of complaints or amendments deleting allegations of the complaint over the objections of the charging party, written notice should be served on all parties of the Regional Director's intention to move for such withdrawal or amendment of the complaint at the hearing. Thereafter, at the opened hearing, the General Counsel should make an appropriate motion to the administrative law judge stating the reasons therefor. The charging party will then have an opportunity to argue its objections to the administrative law judge. (*Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).)

10275.3 *Withdrawal After Opening of Hearing But Prior to Transfer of Case to the Board:* Withdrawal of the complaint is conditioned on the granting of leave by the administrative law judge during this stage.

a. On in-hearing discovery of lack of merit, the trial attorney (after clearance by the regional attorney) should make a motion to the administrative law judge to withdraw the complaint (sec. 10388). As there pointed out, however, the administrative law judge may *dismiss* instead of permitting withdrawal.

b. A request for withdrawal of the charge during this stage (sec. 10276) is subject to the consent of the administrative law judge. On approval of the withdrawal, the complaint shall be dismissed by the administrative law judge.

c. A motion for withdrawal of complaint (and close of hearing) is in order on full compliance with the terms of an informal settlement agreement reached after a hearing has opened.

(On the execution of a *formal* settlement agreement at this stage, the complaint is neither withdrawn nor dismissed. See secs. 10164–10174.)

10275.4 *Withdrawal After Transfer of Case to the Board:* On submission to the Regional Office of an approvable request for withdrawal of charge (see sec. 10276), the General Counsel shall file a motion with the Board moving that request for withdrawal be granted and complaint *dismissed,* not withdrawn. The withdrawal request itself need not be forwarded to the Board.

10275.5 *Where Complaint Issued on Washington Authorization:* If a complaint was issued on authorization from any division or branch in Washington, clearance should be obtained from that division or branch before withdrawal or dismissal of the complaint.

10276 *Postcomplaint Attempts to Withdraw Charge:* A withdrawal request filed by the charging party after issuance of complaint should be closely scrutinized. The motivation behind the request, including the extent to which the act is a voluntary one, is significant. If the request is based on a "private settlement," the terms should be examined; if the charging party has "lost interest," the case should be reexamined as to its strength (a) without his testimony or (b) with his/her reluctant subpoenaed testimony. The request should be denied if, on all the circumstances, the purposes of the Act appear to require the continuation of formal action.

If the request for withdrawal is approved, the complaint will be dismissed by the Regional Director, the administrative law judge, or the Board, depending on the stage of the case at the time such request is filed (sec. 10275; also, Rules and Regulations, Sec. 102.9).

10280 *Answer:* Within 14 days from the service of the complaint, the respondent must file an answer specifically admitting, denying, or explaining each of the facts alleged in the complaint, unless the respondent states in his/her answer that he/she is without knowledge, in which case such statement shall operate as a denial. (See Rules, Secs. 102.20–102.22.)

(With respect to answers that lack particulars, see sec. 10292.2.)

10280.1 *Allegations not Denied Deemed Admitted:* Section 102.20 of the Rules and Regulations provides that allegations of the complaint shall be deemed to be admitted as true if no answer is filed. Likewise, the same section provides that any allegation not specifically denied or explained in a filed answer, unless the respondent states in his answer that he is without knowledge, shall be deemed to be admitted as true and shall be so found by the Board, unless good cause to the contrary is shown.

10280.2 *Motion to Strike Improper Answer:* If an answer is not signed, the filing party should be asked if there was an oversight. If so, it may be corrected. If not corrected, a motion to strike as sham and false should be filed, either prior to the hearing if time permits, or at the opening of the hearing if it does not. If scandalous or indecent matter is included in an answer, a motion to strike, either in whole or in part, should be filed (sec. 10290.3).

If any such motion is denied, the trial attorney should request special permission of the Board to appeal; if the hearing has opened, and the administrative law judge insists on a presentation of the evidence forthwith, the trial attorney should proceed with the case, simultaneously pressing his/her appeal to the Board.

If the motion is granted, the trial attorney should proceed as if only the unstricken portion of the answer has been filed.

10280.3 *No Answer Filed: Motion for Summary Judgment:* If an answer has not been filed within the time allowed, the trial attorney should communicate in writing with the respondent's counsel or, if he/she has none, with the respondent, advising that no answer has been filed in accord with the Board's Rules and Regulations, and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), the General Counsel will file a motion for summary judgment with the Board. If the answer is not filed within the applicable deadline, the trial attorney should file a motion for summary judgment with the Board and obtain an order postponing hearing indefinitely.

If, after the filing of a motion for summary judgment, an answer is finally filed, the motion should still be pressed. Also, if appropriate, motions to strike should be filed.

10280.4 *Answer to Amended Complaint:* The above principles apply to an answer to an amended complaint (see Sec. 102.23, Rules

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and Regulations) except with respect to amendments made *at the hearing*. The nature of the amendment, as seen by the administrative law judge (sec. 10406), will determine whether a full 10 days (sec. 10230) will be given for answer to the amendment.

10282 *Motion for Summary Judgment in 8(a)(5) Cases*

10282.1 *Generally:* In technical 8(a)(5) cases (i.e., where the respondent is testing a Board certification and/or the proceeding on which it is based, and where there are no factual issues warranting a hearing), a motion for summary judgment should be made directly to the Board. This would include consent election cases and cases in which objections or challenges were determined without first holding a hearing, as well as cases in which a hearing had been held prior to the issuance of a decision and direction of election by either the Regional Director or the Board.

In general, if there are factual issues involved, a motion for summary judgment is not appropriate. However, where the case involves an allegation of a technical 8(a)(5) violation, and an allegation that an ongoing strike is caused by the 8(a)(5) conduct, and if there are no factual issues concerning the former allegation, but there are factual issues concerning the latter, the Regional Director may exercise discretion in appropriate cases to litigate solely the technical 8(a)(5) allegations, reserving the right to litigate any issue concerning the status of the strike if and when there is a subsequent refusal to reinstate the strikers.

10282.2 *Regional Procedure:* Give prompt consideration to the advisability of filing a motion for summary judgment whenever it is determined that merit exists in an 8(a)(5) charge and it involves a "technical 8(a)(5)" (i.e., the respondent is testing the Board certification or the proceeding on which it is based).

a. *Memo to Division of Operations Management:* The memo transmitting the complaint to the Division of Operations Management should indicate whether this is the type of case in which consideration will be given to the filing of a motion for summary judgment. The Region may attach a copy of the agenda minute or the final investigation report of the case for the requirement to submit a transmittal memo with the complaint.

b. *Respondent's Answer:* On receipt of the respondent's answer (or expiration of time to file an answer), the Regional Director should then make the determination whether to file the motion. The Regional Director may seek advice from the Division of Operations Management in cases that present unusual or difficult issues.

c. *Motion to Board:* Applications for summary judgment (an original and seven copies each of motion and attachments) in appropriate 8(a)(5) cases should be addressed directly to the Board and transmitted to the Office of the Executive Secretary in Washington. They will be given priority in handling. The Board will follow the same order-to-show-cause procedure used by the administrative law judges.

All copies of the motion to transfer case to and continue proceedings before the Board and for summary judgment must be accompanied by copies of any of the following documents in the formal file:

1. Original charge, amended charge(s)
2. Affidavit of service of charge and amended charge(s)
3. Complaint, amended complaint, and notice of hearing
4. Affidavit of service of complaint, amended complaint, and notice of hearing
5. The respondent's answer to complaint, amended answer
6. Date or dates of filing of answer and/or amended answers.

In the event that the summary judgment proceeding is an 8(a)(5) case involving test of certification, the record should also include copies of any of the following documents in the formal "R" case file:

1. The petition
2. The Regional Director's decision, agreement for consent election, or stipulation for certification upon consent election

3. One copy of the transcript and exhibits. If for some reason including the transcripts and exhibits with the motion would delay its transmission, the Region should note in its submission that the transcripts and exhibits will be forwarded separately. Thereafter, the transcripts and exhibits should be promptly transmitted.

4. All postelection matters, for example

   (a) Tally of ballots, revised tally, proof of service of same, and any objections to same

   (b) Certification on conduct

   (c) Voter eligibility stipulations

   (d) Employer's objections to election or to conduct thereof

   (e) Petitioner's objections to election or to conduct thereof

   (f) Notice of hearing on challenges/objections and proof of service

   (g) Any prehearing orders or motions (e.g., postponement, rescheduling of hearing, and proof of service)

   (h) Briefs to hearing officer

   (i) Any posthearing motions, responses, and orders, e.g., to correct record

   (j) Regional Director's or hearing officer's report and recommendations and proof of service of same

   (k) Exceptions to (j), above, and briefs

   (l) Opposition to (h), above

   (m) Any supplemental decision, direction, or order, or certification by the Regional Director or the Board.

10284–10288 *Submission by Stipulation*

10284 *Generally:* There may be occasions on which the parties (including the General Counsel), being in agreement on the facts but not on the applicable law, desire to bypass the hearing stage. In view of the savings in time, energy, and funds, resort to this procedure should be encouraged where it is appropriate. Such occasions may arise in 8(a)(5) cases in which prior representation cases are sought to be tested; cases involving new questions of law or policy; and cases the facts of which have been litigated in ancillary proceedings.

In view of this policy of encouragement, and in view of the endless variety of cases met with, no rigid rules in this respect are to be applied. Since the entire device is a product of agreement between the parties, inner details must also bend in accordance with the accord of the parties. However, the material appearing below should be used as a guide.

a. A submission by stipulation may take either of two routes. It may go to the administrative law judge for his/her determination by way of a decision, thereafter following the path of all other cases. Or, it may bypass the administrative law judge entirely and go directly to the Board. The General Counsel should attempt to secure submission directly to the Board.

b. In *either* case, there must be a complaint and (except under unusual circumstances) an answer; a notice of hearing and any orders rescheduling or adjourning the hearing; a stipulation as to the facts; an agreement as to the contents of the record; and an express waiver of those procedures that are being bypassed.

   The accompanying notice of hearing, if a complaint is now being issued, should denote an indefinite adjournment; and, if a notice of hearing has already been issued, an order indefinitely postponing the hearing should be issued.

c. The facts being stipulated must be sufficiently detailed to form the basis for findings. They must be agreed on; conflicting factual versions cannot be resolved on "stipulation." They may, and ordinarily should, take a narrative form. Documents or transcripts of other proceedings that the parties desire to be in the record should be incorporated by reference and attached.

One party may insist on the inclusion of facts that the other party contends are irrelevant. If it is agreed that they are true, they should be included if either party considers them relevant (for this may be the very "legal" point that the parties are seeking to resolve). But the submitting document should recite that the parties do not necessarily concede the relevance of each fact recited; and any party urging irrelevance would do so in a brief, the use of which is usually provided for.

10286 *Submission to an Administrative Law Judge:* A typical submission to an administrative law judge consists of a "Stipulation" of the nature above indicated, addressed to the Division of Judges. The holding of a hearing is expressly waived. The privilege of filing a brief to the administrative law judge is usually reserved by the parties, said briefs to be due by a date to be set by the administrative law judge.

An original and one copy should be submitted to the Chief Administrative Law Judge.

On issuance of an administrative law judge's decision, the procedure outlined in sections 10430–10444 should be followed.

10288 *Submission to the Board:* The matter may be submitted directly to the Board by means of a motion to transfer proceeding to the Board or—more commonly—by detailed stipulation.

This is a pattern for the motion. An original and seven copies of the motion and/or the stipulation should be submitted. An original and seven copies of all exhibits and attachments accompanying the motion and/or the stipulation should be submitted.

> Comes now __________, the Respondent __________, the Charging Party, and the General Counsel, being all the parties to this proceeding, and hereby petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board and to transfer this proceeding to the Board.
>
> The parties agree that the Charge, Complaint, and the "Stipulation of Facts" constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The

> parties further stipulate that they waive a hearing before an administrative law judge, the making of findings of facts and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision; and desire to submit this case for findings of facts, conclusions of law, and order directly by the Board.
>
> In the event the Board grants this motion, the parties request that the Board set a time for the filing of briefs [; and, in addition, the respondent and the charging party request an opportunity for oral argument].

The motion should be signed by all parties or their counsel, including counsel for the General Counsel. Except in his supervisory capacity, exercised through the regional attorney, the approval of the Regional Director is not required.

If the matter is submitted by *stipulation* rather than by motion to transfer, the preamble should contain the substance of the foregoing. The same stipulation should then recite the facts.

The stipulation of facts should be prepared along the lines discussed in section 10284, c. It should end with:

> This stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any facts stated herein.

After the Board acts, briefs may be filed in accordance with the terms of the Board order. Subsequent action should accord with procedures described in sections 10442-10452.

10289 *Informal Trial Procedures:* Parties by stipulation are permitted to dispense with a verbatim transcript of oral testimony and to waive the filing with the Board of exceptions to the administrative law judge's findings of fact (but not to conclusions of law or recommended orders). These procedures are appropriate for cases where there are limited issues before the administrative law judge and these issues involve essentially credibility (see Rules and Regulations, Sec. 102.35(i)). All parties to a case, and also all alleged discriminatees who are not parties, must join in the stipulation involved in these procedures and must be advised fully of the implications of the waiver.

Questions concerning this procedure or its appropriateness in specific cases should be submitted to the Division of Operations Management.

10290–10292 *Pretrial Motions*

10290 *Generally:* Pretrial requests (or motions) for postponement, or extension of time to file answer, to intervene, or to take deposition, should be filed with the Regional Director. All other pretrial motions except Motions for Summary Judgment are filed with the Chief Administrative Law Judge in Washington, D.C., or with the West Coast Presiding Judge as the case may be. Motions for Summary Judgment are filed with the Board.

All pretrial motions shall be filed by the moving party in an original and four copies (except summary judgment, where eight copies are required) and copy thereof immediately served on the other parties; and proof of service furnished. Motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.

10290.1 *Oppositions:* Opposition or other answer to a pretrial motion may be filed—same number of copies and service as above required.

10290.2 *Ruled on by Regional Director:* The Regional Director may, and normally should, rule on pretrial motions to extend the time in which to file an answer; to intervene in a matter; to postpone the opening of the hearing; or on application to take depositions. His/Her rulings should be in writing and a copy served on each of the parties.

10290.3 *Ruled on by Administrative Law Judge:* An administrative law judge designated by the Chief Administrative Law Judge, or by the West Coast Presiding Judge, shall rule on all prehearing motions except those specified in section 10290.2 and Motions for Summary Judgment. Such administrative law judge rulings issued prior to the opening of the hearing shall be in writing and a copy served on each of the parties.

10290.4 *Appeal from Ruling:* Such rulings by the Regional Director or the administrative law judge may be appealed directly to the

Board only on special permission of the Board, but, if exceptions are taken, they will be considered by the Board in reviewing the record.

10290.5 *Motions and Rulings Thereon Part of Record:* Pretrial motions and rulings thereon will be introduced into the record as part of General Counsel's Exhibit 1, *except* for motions to revoke subpoenas and rulings thereon, which become part of the record only on request of the aggrieved party. As to subpoenas, see section 11782.

10292 *Types of Pretrial Motions*

10292.1 *For Bill of Particulars Addressed to Complaint:* The most commonly filed motions in the past have been motions for bills of particulars addressed to complaints. It is believed that strict adherence to Complaint, Particularity, section 10266, will cut down the filing of such motions and virtually eliminate their success. If a motion for particulars is filed, and if the complaint contains insufficient detail or if there is some question as to their sufficiency and the trial attorney is willing to furnish the details requested, he/she should agree to furnish the particulars. If the complaint is already sufficiently detailed, the motion should be opposed. In the event of an adverse ruling, however, the ruling should be complied with promptly.

If it is necessary to furnish a bill of particulars, it should be unnecessary to delay proceedings for the bill's preparation. Since the trial attorney's own draft of the complaint should be completely annotated, he/she should be able to prepare a bill of particulars forthwith. A copy of any bill of particulars supplementing a complaint should be submitted to the Division of Operations Management.

10292.2 *For Bill of Particulars Addressed to Answer:* A motion for a bill of particulars addressed to the answer is less frequently made than one addressed to the complaint; however, where it is felt that an affirmatively pleaded defense lacks details, the motions should be made.

10292.3 *Where Answer Defective in Content:* Where an answer has been filed that is defective in content, a motion to strike, motion for default judgment, or motion for summary judgment, whichever is appropriate, should be filed—either before the hearing opens or, if time does not permit, at the opening of the hearing. However, and this is true of all aspects of the trial attorney's work, the case should not be delayed by hypertechnicalities that do not contribute to a disposition that will effectuate the purposes of the Act.

(For discussions of motions to be made where no answer has been filed, where one has been filed late, or where service of an answer was defective, see Answer, sec. 10280.)

10292.4 *Pretrial Discovery Devices:* The Federal Rules of Civil Procedure providing for compulsory pretrial discovery have been held not applicable to Board proceedings. They should not be used by the trial attorney; any attempt by the parties to use them should be resisted.

(On the use of the deposition as part of the trial, see Depositions, sec. 10352.)

10294 *Prehearing Postponements*

10294.1 *General Policy:* The general policy of the Regional Director should be that cases set for hearing will be heard on the day set, and that postponements will be granted only for good cause shown (see sec. 10258).

Every effort should be made to acquaint parties in the Region and, particularly, parties in a given case of this fact and of the procedure to be followed in seeking a postponement.

(Form NLRB-4338, with instructions for requesting postponements and with the names and addresses of the parties appearing thereon, should accompany each notice of hearing. Any party seeking postponement should be apprised of the proper postponement-request procedure.)

10294.2 *Request for Postponement:* Postponement of the opening date of a hearing is initiated by request (or motion) for postponement by the party seeking it. The motion/request should be in writing; original and two copies served on the Regional Director and copies served simultaneously on each of the other parties. The request should contain *detailed* cause (i.e., not merely "prior commitments") and should contain suggested date(s) for resetting. Finally, except in emergency situations, it should be filed at least 3 days before the date then set for hearing.

The requesting party must ascertain in advance, and set forth in the request, the positions of all other parties to the proceedings. Where appropriate, the request may be a joint one.

10294.3 *Ruling on Request:* The Regional Director rules on the request. Wherever possible, he should wait until opposing parties will have had the opportunity of making known their positions—perhaps until after mail delivery on the day following receipt of the request.

If the Regional Director intends to grant the request he should clear a new hearing date with the Division of Judges (see Procurement of Hearing Date, sec. 10258) and issue his ruling, serving a copy on each party (sec. 10026). The order should appear on the printed Order Rescheduling Hearing (Form NLRB-859) or should be "tailored" to fit the situation. (With respect to Board proceedings, postponing, rescheduling, continuing, and adjourning are used interchangeably.)

10294.4 *Followup Action on Postponement:* Normally, postponements are to a day certain. They may, if demanded by circumstances, be *indefinite (sine die)*; for example, in the event of a settlement. Subsequently, further action should be taken with respect to such postponements: The hearing should be rescheduled by means of formal order, or the parties and Division of Judges should be informed that the hearing will not be held.

10294.5 *Request and Ruling Included in Record:* Postponement requests, statements of opposition, and rulings thereon will subsequently be introduced into the record at the hearing. (See Hearing, Formal Papers, sec. 10384.)

10294.6 *Postponement of Hearings in Emergency Situations:* Frequently Regional Directors find it necessary to postpone hearings at the last minute due to circumstances beyond their control. Postponements have been granted for emergency reasons during weekends immediately preceding hearings scheduled to open on a Monday. In many instances, if the Division of Judges receives prompt notification, the administrative law judge assigned to the case could be reached prior to departure from Washington or San Francisco.

10310–10312 *Injunctive Relief Under Section 10(j)*

(For discussions of injunctive relief under Secs. 10(e) and 10(l), see Enforcement Proceedings, sec. 10506, and Statutory Priority Cases, secs. 10230–10234.)

10310 *Request for Injunctive Relief:* On occasion, a charging party, at the time of filing the charge or thereafter, will request that the Board petition a district court for temporary relief or a restraining order in addition to issuing a complaint; or the Regional Director may believe that such relief is warranted.

It should be kept in mind that such relief is discretionary, not mandatory.

Cf. Injunctive relief in CC, CE, and CP cases (sec. 10230); and that injunctive relief under this section must be authorized by the Board. Further, such cases have some priority over other cases in the office (sec. 11740).

10310.1 *Report to Washington and Notification to Charged Party:* Immediately on receipt of a request from a party for 10(j) relief, or whenever the Regional Director believes that such relief is necessary, the latter should notify the Division of Operations Management and notify the charged party orally or in writing. This may result in prompt cooperation in the investigation and will also provide an opportunity to argue to the Region and thereby to the General Counsel why 10(j) injunctive relief would not be appropriate. The notification should take place as soon as possible after the request is made or the *sua sponte* determination made by the Region.

In all but those cases in which further proceedings are not warranted on the merits or cases in which injunctive relief is clearly unwarranted, the Regional Director should promptly forward to the Division of Advice a report on the merits and recommendation as to injunctive relief. When the Regional Director believes that the 10(j) request should clearly be denied, this conclusion should be cleared by telephone to the appropriate Assistant General Counsel, Division of Operations Management, who, if it is deemed necessary, may have the matter referred to the Division of Advice for further consideration. All subsequent activity and developments should be reported immediately.

In cases where a Regional Office has decided to issue a complaint, and is submitting a recommendation to the Division of Advice in favor of seeking 10(j) relief, the Region's submission should be in the form of a memorandum that will be sufficient, in terms of form, comprehensiveness, and quality, to transmit to the Board if the General Counsel concurs with the regional recommendation. Thus, that memorandum should set forth the fact findings to be relied on, the legal analysis establishing the violation, the reasons why 10(j) relief is considered necessary, and the specific interim relief to be requested. Although weaknesses of the case should be candidly noted, the memorandum should "argue" in favor of the violation and of the necessity for 10(j) relief. The memorandum should be addressed to the Division of Advice. If sufficient, the General Counsel would simply transmit the memorandum to the Board with a covering memorandum indicating concurrence. Where necessary, the covering memorandum would deal with additional points.

In cases where the Regional Office is submitting the issue of merit to the Division of Advice and is recommending complaint and 10(j) relief, the same procedures should be followed with the exception that the analysis section should pose the legal or policy issues submitted for advice and should fully discuss all aspects of these issues. The sections dealing with the need for 10(j) relief and the nature of the relief would be written on the assumption that Advice would agree with the Region's recommendation to issue complaint. Assuming that Advice does agree, and that the General Counsel would seek Board authorization for 10(j) proceedings, the Division of Advice would simply recast, if necessary, the analysis section so as to "argue" in support of the violation, while candidly dealing with the problems presented.

Cases in which the Region recommends that no complaint issue or that 10(j) proceedings not be instituted should be submitted in a normal request for advice. Where the Region finds no merit to the charge and is not submitting the issue of merit to Advice, the 10(j) issue is not presented and the matter need not be submitted to Advice.

10310.2 *Guidelines for the Utilization of Section 10(j):* There is no statutory delineation of criteria governing the use of Section 10(j), nor has case law developed a definitive, governing formula. However, experience has developed some guidelines that are helpful. The following factors have been considered in determining whether proceedings under Section 10(j) would be appropriate in a given case:

a. The clarity of the alleged violations

b. Whether the case involves the shutdown of important business operations that, because of their special nature, would have an extraordinary impact on the public interest

c. Whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern

d. Whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices through resort solely to the regular procedures provided in the Act for Board order and subsequent enforcement proceedings

e. Whether the unfair labor practices involve interference with the conduct of an election or constitute a clear and flagrant disregard of Board certification of a bargaining representative or other Board procedures

f. Whether the continuation of the alleged unfair labor practices will result in exceptional hardship to the charging party

g. Whether the current unfair labor practice is of a continuing or repetitious pattern

h. Whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief.

These factors are not all inclusive, nor does the presence of one or more factors enumerated above necessarily require that we institute 10(j) proceedings, but they do indicate what the Board has considered in given cases in determining whether such proceedings are warranted.

10310.3 *Reporting Requirements in Violence Cases:* In such cases it is important that the *current* status of the situation be reported, as well as a full listing of the violative conduct. Also, any relevant change of circumstances after the submission should be promptly reported by phone or wire.

10310.4 *Settlement Efforts and Issuance of Complaint Pending 10(j) Determination:* The Regional Office should begin settlement efforts immediately after it has been determined that the charge is meritorious and should issue complaint after such settlement efforts fail. There is no need to withhold these procedures while the 10(j) issue is pending in Advice.

In 10(j) cases where the Regional Director is submitting to Advice the issue of merit, the Region should withhold action until word from Advice is received. On authorization of complaint, the Region should immediately commence settlement efforts and, absent settlement, should issue complaint.

10310.5 *Expeditious Court Actions:* If it is decided that 10(j) relief should be sought, the Region will be notified and complaint must issue before any court action is undertaken. Absent settlement, the Region should file the 10(j) petition with the district court within 48 hours of the Advice authorization. If the Regional Director is of the view that rigid adherence to the 48-hour rule will be counterproductive (e.g., a settlement is imminent and the filing of the petition may upset this prospective settlement), authorization may be sought from the appropriate Assistant General Counsel to file the petition outside the 48-hour deadline.

Problems of compliance with 10(j) injunctions will be reported to the Division of Advice.

10310.6 *Court Action: Order to Show Cause:* In any 10(j) case, where the court makes the order to show cause returnable at an unduly late date, consideration should be given as to the advisability of applying for a temporary restraining order; even though had an early hearing date been set, no application for a temporary restraining order would have been made. In such situations, the Region should immediately communicate with the Division of Advice to discuss this problem.

Whenever it appears that the court is inclined to make the order to show cause returnable at a late date, it should be reminded of the congressional policy relating to Section 10(j) and the emergency nature of proceedings under that section.

In all cases where 10(j) injunctive relief is being sought, Regions should assure the court that the General Counsel will make every effort to expedite the proceedings before the Board and will oppose any unwarranted attempt by any party to delay the Board proceedings. Likewise, in every case where 10(j) injunctive relief has been obtained or is being sought, Regions should so inform (a) the Chief Administrative Law Judge when scheduling the hearing; (b) the assigned administrative law judge at the hearing on the record; and (c) the Board in the brief filed with it. At each stage, Regions will respectfully request that the case be processed expeditiously pursuant to Section 102.94 of the Board's Rules and Regulations.

10312 *Liaison Between the Region and the Division of Advice:* Whenever requested injunctive relief is denied in whole or in part, the Division of Advice should promptly be notified and a copy of the court's decision and order, if any, should be forwarded to the Division of Advice, together with the Region's recommendation on whether an appeal should be taken.

Copies of notices of appeal or other papers served on the Regional Office in connection with an appeal from the court's decision should be promptly forwarded to the Division of Advice, except after the Office of the General Counsel has entered an appearance in the matter and it is clear from the affidavit of service or other documents that the Office of the General Counsel has already been served with such papers.

Whenever it is charged or it appears that an injunction order is being violated, the Division of Advice should be promptly notified, and after its investigation the Region should submit to the division its recommendation on whether contempt proceedings are warranted.

10330–10340 *Trial Preparation, C Case*

10330 *Generally:* Adequate preparation is the basis for the successful prosecution of a case. No matter how "strong" the case, it will not successfully survive poor preparation. Accordingly, the period immediately preceding the hearing should be singlemindedly devoted to the building of a solid foundation for trial.

The trial attorney should review the facts concerning remedy as an integral part of preparation for hearing. If any testimony or evidence is needed as a factual basis for supporting any part of the Region's proposed remedy, this should be included in the plans for introduction at the hearing.

10332 *Analysis of Pleadings:* The pleadings must be carefully analyzed in order to determine the relevant issues—around this analysis will be based the pretrial investigation; the introduction of or attempt to exclude evidence; the arguments made at the hearing; and (unless events at the hearing altered the directions to be taken) the posttrial activities. One must read between the lines for possible double meanings and loopholes and must be prepared for any eventuality suggested by the pleadings.

10334 *Pretrial Investigation:* Such interviews of witnesses and examinations of documents as are dictated by the circumstances of each case should be conducted.

10334.1 *Investigation as to Charged Party's Ability to Comply with Remedy Sought by Agency:* Following trial assignment, during pretrial investigation, and following the trial, the trial attorney should assess the respondent's current ability and, when possible, future ability to comply with the remedy sought by the Agency. Inquiry should be made of the charging party, the witnesses, and the respondent as appropriate, and any indications that the respondent has rendered or will render itself unable to comply should be fully investigated and appropriate action taken. Consideration should be given to the appropriateness of protective relief (see sec. 10643), or amendment of the complaint to allege parties, such as an alter ego, successor, individual, trustee in bankruptcy, or other party, as derivatively liable for remedying the alleged unfair labor practices (see secs. 10027, 10064.3, 10257, 10274, 10505, 10528.16, and 10643). The trial attorney should continue to monitor the respondent's ability to comply until the case is transferred to the Compliance Officer (10407.5 and 10430–10434).

In addition, charging party and witnesses, whose potential remedial rights may be affected, should be advised to notify the trial attorney immediately of any significant change in the respondent's operation, identity, or financial condition so that an assessment of ability to comply or derivative liability can be made.

10334.2 *Interview of Witnesses:* The trial attorney should interview each prospective witness as many times as is necessary in order to properly prepare for trial. Occasionally, it may be necessary at the hearing to request a short recess for this purpose. The trial attorney's interrogation should be intensive and, if possible, should cover all matters that might be covered by a cross-examiner. (For general principles regarding interviews of witnesses, see sec. 10058, and credibility, sec. 10060.) The use of leading questions should be avoided.

When a witness suffers a loss of memory on an important matter, that phase of the case should be reviewed until the attorney is satisfied that the witness' memory is fixed. Any details that will help to refresh this memory should be noted. If difficulty is experienced in directing the witness' attention to a new subject without leading questions, the attorney should set forth carefully in trial brief the actual question, in proper form, that will succeed in so directing the witness' attention.

The necessity for reinterviews will be determined by the nature of the case and the calibre of the witness. The danger implicit in repeated interviewing of reducing the witness' testimony to a pat-sounding story must be weighed against the advantages of fixing details and of obtaining additional information. Certainly, there should be reinterviews when their necessity is indicated by lately filed pleadings.

Where adverse items are adduced by recent interviews, or where matters that affect credibility of a witness are lately discovered, the regional attorney should be consulted.

10334.3 *Witness Affidavits/Statements:* If no affidavit has been procured from a prospective witness, a fresh attempt should be made. If one is available, its contents should be rechecked. The attorney should discuss with each prospective witness the type of statement, if any, given to the Board agent during the investigation of the case (i.e., whether the witness had signed, approved, or adopted the statement) (secs. 10394.7–10394.12).

10334.4 *Instructions to Witnesses:* Care should be taken lest the witness gets the feeling of being coached. Moreover, on the contrary, the witness should be told that the truth is expected whomever it may help or hurt, and should be told further that the truth should be adhered to even if asked, at the hearing, what conversations took place with the trial attorney.

Among the further instructions to be given are that, at the hearing, the witness should consider each question before answering it; should ask for a rephrasing if the question is not understood; should remain calm in the face of possible baiting or goading; and should answer no question to which an attorney objects unless and until the administrative law judge overrules the objection.

10334.5 *Examination of Documents:* The nature of the examination of documents or records depends on the individual case. In general, precautions should be taken with respect to their preservation; and care should be exercised with respect to their authentication.

10336 *Trial Brief:* A trial brief is considered both necessary and mandatory as a case preparation device. It serves as a guide and checklist to the attorney in the preparation and trial of the case and may be used to good advantage in making opening and closing statements.

Preparation of the trial brief should commence immediately after decision to issue complaint; it is never "completed" since insertions will be made even during the hearing. But, to the extent it is completed by the time the hearing opens, a copy should be kept in the Regional Office by the regional attorney.

The test of any "good" trial brief lies in the ability of a new attorney to take over the case and, through the trial brief, try it with a minimum of preparation. Although the contents will vary with each case, it should at least contain the following elements:

a. List of formal exhibits with exhibit numbers, descriptions of exhibits to be offered, and space for noting all exhibits actually offered

b. Issues and outline of theory

c. Abstract of pleadings to include allegations made, elements to be proved, admissions and denials, and affirmative defenses

d. Preliminary motions to be made with brief statement in support thereof

e. Stipulations that have been procured, are expected, or should be sought

f. Documents and materials expected to be offered and sought to be produced by other parties

g. Order of witnesses and exhibits:

  1. Witnesses and order of call, together with a brief statement of their expected testimony, key questions, exhibits to be introduced during their testimony, and their affidavits (on separate pages, with space for noting variances)

  2. Exhibits and order of introduction showing the witnesses through whom exhibits will be introduced (cross-references to a, above)

h. Prospective respondent witnesses (preparation for cross-examination), an outline or narrative summary for the respondent's prospective witnesses, including prior statements or affidavits, pertinent conference memos and letters, and impeachment material (on separate pages, with space for noting variances)

i. Expected chronology, with space available for noting variances—a narrative in outline form of the expected testimony to include, inter alia, exhibits to be introduced through the witness; points on which the witness' testimony corroborates other witnesses and the names of such witnesses; and points on which witness' testimony is corroborated by other witnesses and the names of such witnesses (cross-references to g and h, above)

j. Legal authorities applicable to trial problems—citations and authorities on evidence problems that are indicated, such as, to support the admission or rejection of certain questionable evidence intended to be offered or anticipated that the opposing party will offer

k. Rebuttal witnesses with their prospective testimony prepared as in g, above

l. Closing motions, such as conformance of pleadings to proof

m. Closing argument outline (with space for changes during hearing).

10338 *Preparation of Exhibits:* Documents or records expected to be introduced in evidence should be reproduced in advance, preferably by photocopy, so that sufficient copies will be available for the introduction, for furnishing other parties with copies, and for retention of a copy. Originals should be retained even though leave will be requested to substitute copies for them, so that authenticity can better be established. Where only a part of a document or record will be offered and is reproduced, the whole should be kept available for inspection.

No informal markings should be inserted on documents or records that are to be introduced (sec. 10384).

10340 *Service of Subpoenas:* It is a desirable practice that subpoenas ad testificandum be served at least 5 days prior to their return dates and that subpoenas duces tecum be served at least 10 days prior to their return dates. Where a motion to quash is a foreseeable possibility, still earlier service is desirable so that the motion can be ruled on in advance of hearing (see secs. 11778 and 11782.4). Note that subpoenas are to be served on the party, not its attorney. See section 11778. However, when serving subpoenas on the party or witness, a copy of the subpoenas should be sent to the attorney or other representative of the party or witness.

10350 *Prehearing Conferences with Parties:* This is at least the third stage at which a settlement attempt may be feasible. (See secs. 10126 and 10254.) The opening "wedge" for the discussion, conceivably, could be the arranging of conferences for the purpose of narrowing issues (see Statements of Procedure, Sec. 101.7).

The main value of prehearing conferences is the potential agreement on facts. The extent of revelation of one's evidence (for purposes of procuring agreement) should be determined on a case-by-case basis. Agreement with respect to a key fact may be procured as part of agreement to a collection of facts. Prehearing stipulations should be reduced to writing and executed as soon as possible (sec. 10381.1).

In the event formal settlement is achieved, the hearing should be postponed indefinitely (sec. 10294.4). If an informal settlement agreement is obtained, the complaint and notice of hearing is withdrawn on the approval of the Regional Director (sec. 10148.1). Upon such approval, notify the Division of Judges that the case should be removed from the hearing calendar (sec. 10294.6).

10352 *Depositions*

10352.1 *Depositions; General:* The Federal Rules of Civil Procedure providing for various types of compulsory pretrial discovery have been held not applicable to Board proceedings; therefore, depositions may *not* be used merely for purposes of pretrial discovery. They may be taken only for good cause shown after issuance of complaint.

Particularly where credibility is an issue, the use of depositions should be discouraged, unless good cause is shown. A better alternative would be, where practicable, to request an adjournment of a portion of the hearing to a time and place at which the witness can testify.

10352.2 *Application for Deposition:* The application for deposition is made to the Regional Director or, if the hearing has opened, to the administrative law judge. (See Sec. 102.30 of the Rules and Regulations for detailed requirements.) If, in the discretion of the Regional Director or administrative law judge, good cause has been shown, he/she will make and serve on the parties an order granting the application.

10352.3 *"Good Cause":* "Good cause" may arise from a variety of circumstances. It relates generally, however, to situations where the witness will not be available to testify at the hearing. The lack of availability may be due to the witness' illness or to the fact that he/she is not within reasonable proximity of the place of hearing or to other circumstances.

10352.4 *Order and Notice of Deposition:* If the Regional Director or administrative law judge is satisfied that good cause exists, he/she should issue an order and notice of deposition. The order should set forth the name of the witness whose deposition is to be taken, the date, hour, and place of deposition, and the "officer" before whom the "witness" will testify. All parties should be served with the order.

10352.5 *Taking of Deposition:* The deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place of deposition, including a Board agent thus authorized. At the time and place specified, the officer should permit the witness to be examined and cross-examined under oath. All parties may participate; a representative of the General Counsel is expected to be present and to participate.

(Arrangements for representation by an attorney from the Region in which the deposition is to be taken should be made by memo, copies submitted to the Division of Operations Management. Authorization for the trial attorney to travel to and appear at a deposition outside his own Region, where this appears necessary, should be procured from the Division of Operations Management.)

Objections should be noted on the record—otherwise, they will be deemed waived—but the officer has no power to rule on them; the questions normally should be answered.

10352.6 *Reporter and Transcript of Testimony:* The party seeking the deposition must arrange for and must pay the reporter (who may or may not be the officer), and he/she should be so informed at the time the order is issued. An original and two copies of the transcript of testimony should be delivered to the Regional Director for prehearing depositions, or the administrative law judge for other depositions. The transcript must be signed by the witness unless counsel by stipulation waive such signature.

On written stipulation of the parties, the technical requirements noted above may be dispensed with.

10352.7 *Introductions into Evidence:* Transcripts of depositions should be marked for identification and introduced into evidence as an exhibit, by one party or by stipulation. At this time, the General Counsel should point up and/or further support any objections he/she may have voiced to questions put to the witness. The administrative law judge rules on the admissibility of the depositions or any part thereof. Errors or irregularities will be deemed to be waived in the absence of a prompt motion to suppress part or all of a deposition.

10380–10412 *The Hearing*

10380 *Role and Conduct of Trial Attorney:* The trial attorney is an advocate. As the representative of the General Counsel, who has caused the complaint to be issued, it is his/her duty to introduce admissible evidence that will support the allegations of the complaint. In so doing, he/she must not suppress or distort material evidence, or in any way reflect a desire to obtain a "conviction at any cost", but this does not mean he/she must present the respondent's defenses.

10380.1 *Relations with Parties:* As an officer of the court and as a public servant, the trial attorney's relations with others at the hearing should be marked by courtesy, dignity, common sense, and restraint. He/She should refuse to indulge in personalities and should avoid useless cross-table remarks; should refrain from engaging in extended arguments; and should not allow himself/herself to be deterred from the appointed task—to get the facts on the record.

The trial attorney should affirmatively cultivate friendly relations with the parties, inside and outside the hearing room. On the other hand, common sense should tell him/her when to hold back. In relations with the administrative law judge, the trial attorney should never subject the latter to the possibility of a charge, even though unfounded, of bias and prejudice. Undue fraternization with the respondents or their counsel may create suspicion and distrust in the charging party. Finally, although association with the charging party is natural and necessary, the trial attorney should maintain a "discreet aloofness" and not become labeled as a "union attorney" or "company attorney," as the case might be.

10380.2 *Attitude Toward Administrative Law Judge:* The trial attorney should be an example to the other parties by being punctual in attendance at the hearing, by complying carefully with the recess limitation, and by conforming rigidly to the procedural rulings laid down by the administrative law judge. In order to contribute to the dignity and decorum of Board proceedings through personal example and conduct, the counsel for the General Counsel should address and refer to the administrative law judge the very same way he/she would a judge by using such expressions as "the Court" and "Your Honor." In counsel's objections voiced to actions or rulings of the administrative law judge—for, since counsel must exercise independent judgment in presenting the case, he/she cannot blindly follow the dictates of an administrative law judge who had ideas of his/her own—counsel should act with courtesy and appropriate deference; and must, with good grace, bow to the eventual ruling or address his/her appeal elsewhere.

10380.3 *Responsibility for Prosecution of Case:* The attorney's position vis-a-vis the charging party is a delicate one. During the hearing, the charging party or counsel may make suggestions or give advice; or he/she may wish to embark along lines of his/her own. The trial attorney must determine that suggestions to adopt, which embarkations should be resisted. He/She must be tactful but firm, keeping in mind that the primary responsibility for the prosecution of the case is his/hers. Although the charging party is entitled to examine witnesses and to introduce or adduce additional evidence on his/her behalf, the trial attorney should oppose, either informally or, when necessary, by proper objection on the record, anything that in his/her sound discretion either will jeopardize the prosecution of the complaint or is unnecessarily cumulative.

10380.4 *Record:* With respect to the last point, the trial attorney should do what he/she can to keep the record short. He/She should be willing to stipulate to that which can be properly proved; refrain from introducing evidence; and avoid making lengthy arguments. This will not only cut expenses; it will make for a record that will best assist in the attainment of a speedy effectuation of the policies of the Act.

10381 *Pretrial Conferences; Administrative Law Judge:* In advance of each hearing, parties are notified of the opportunity for a pretrial conference. This instruction is set forth in Form NLRB-4668, Statement of Standard Procedure in Formal Hearing Held Before the National Labor Relations Board in Unfair Labor Practice Cases, which is sent to all parties with the complaint and notice of hearing.

At the date, hour, and place for which the hearing is set, the administrative law judge, on the joint request of the parties, will conduct a "prehearing" conference prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear cut; or he/she may, on his/her own initiative, conduct such a conference. The administrative law judge will preside at any such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not unnecessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record (e.g., in the form of statements of position, stipulations, and concessions). Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately on completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

This opportunity for conference conducted by the administrative law judge on the hearing date does not preclude earlier meetings to narrow the issues or effect settlement.

The pretrial conference may be held either at the joint request of the parties or on the initiative of the administrative law judge. The Region should take the initiative by seeking the agreement of all parties to the pretrial conference and by participating when such conference is requested by another party or the administrative law judge.

10381.1 *Objectives:* The objectives of the pretrial conference are:

a. To avoid surprise and obfuscation by having the issues and respective theories of the complaint and answer spelled out, and

b. By stipulation and agreement to simplify the issues and eliminate the taking of evidence on relevant matters about which there is no real dispute, thereby achieving a record that is shorter and much less cluttered.

Such conferences may have the additional benefit of obviating the necessity for litigation by providing the parties a further opportunity to negotiate a settlement at a conference conducted by the administrative law judge.

10382 *Opening of Hearing:* The hearing will open at the place, date, and hour scheduled. If there is a deviation, the occasion and the acquiescence of the parties must be put into the record at an early opportunity.

Where more than one case has been placed on a "calendar call" (sec. 10258), the administrative law judge, normally, will informally discuss with the parties, at or about the hour indicated in the notices of hearing, the order, estimated time consumption, and estimated resumption time for each hearing. Agreement being reached (with the understanding that arrangements are subject to change due to conditions and at the convenience of the parties), the administrative law judge will open each case, note the agreement on the record, and make appropriate announcements with respect to the times and places of adjournment.

(Should it become necessary subsequently to alter these arrangements, the alterations themselves will later be announced on the record.) It is not necessary, unless the administrative law judge insists, that the formal papers be put into the record until the hearing in each case is resumed on the merits.

10384 *Formal Papers:* The formal papers, consisting of the original charge, any amended charges, complaint and notice of hearing, Form NLRB-4668, Statement of Standard Procedure in Formal Hearing Held Before the National Labor Relations Board in Unfair Labor Practice Cases, each written postponement request and order thereon, pretrial motions and rulings thereon (but with respect to subpoenas, see sec. 11782), and an affidavit of service of each of the above documents served by the Regional Office, should have been assembled in advance, arranged in chronological order from bottom to top, and marked as General Counsel's Exhibits 1(a), (b), (c). The last (top) document, bearing the last number of the series, should be an Index and Description of Formal Documents.

Before the hearing opens, the parties should be shown the formal papers and given a copy of the index. (This may have been done at a previous prehearing conference, see sec. 10350.)

Copies of Form NLRB-4668 should be available for any party or representative who may not have received one.

After the administrative law judge has ascertained that all parties and counsel are apprised of the printed "Statement," he/she will ask counsel for the General Counsel to proceed. Counsel should introduce the formal papers with substantially the following statement:

> I offer into evidence the formal papers. They have been marked for identification as General Counsel's Exhibits 1(a) through 1( ), inclusive, Exhibit 1( ) being an index and description of the entire exhibit. This exhibit has already been shown to all parties.

Extended arguments in support of their receipt into the record will not normally be necessary; it should be sufficient, when objection is raised, to note that these papers are pleadings, normally part of any judicial or administrative record, and that they are offered not as indicative *per se* of the truth of any of their contents, but as constituting a foundation for future proceedings.

10386 *Opening Statements:* Opening statements should be made if in the opinion of the trial attorney it would be helpful to the administrative law judge in his/her consideration of the case. For example: where a novel legal theory is involved; where certain elements in the picture, without prior explanation, would appear to be irrelevant; or where the context of the case needs to be set—in short, where it is apparent that the administrative law judge will need a prior explanation to help him/her make evidentiary rulings. Of course, a statement should be made if requested by the administrative law judge.

10388 *Trial Motions:* All motions made during the hearing should be in writing or made orally on the record. Rulings by the administrative law judge, and any orders in connection therewith, may be in writing, in which case all parties should be served therewith, or they should be stated orally on the record.

(The administrative law judge may reserve rulings, depending on the nature of the motion. Eventually, he/she should rule on all motions made to him/her.)

An administrative law judge's rulings made at the hearing may be appealed directly to the Board only on special permission by the Board, but, in any event, they will be considered by the Board on its review of the record (sec. 10404) if exception to the ruling is included in a statement of exceptions.

(With respect to motions addressed to the answer, see secs. 10280 and 10290–10292; on motions to amend complaints, see sec. 10274; on procedures surrounding revocation of subpoenas, see sec. 11782; on motions to exclude witnesses, see sec. 10394.1; and on motions for continuances, see sec. 10406.)

Where feasible, a motion made by the trial attorney should be accompanied by a proposed order for the administrative law judge's signature with sufficient copies for the parties.

10388.1 *Motion to Intervene:* A motion to intervene may be granted to the extent and on such terms as the administrative law judge deems proper. Motions by persons with a legitimate interest should not be opposed, except, where appropriate, as to extent of intervention. It is preferable to err on the side of permitting intervention in case of doubt, but the trial attorney should be alert to resist unwarranted incursions.

The presence of unnecessary parties, whatever other harm it will cause, is almost sure to lengthen the record unnecessarily.

10388.2 *Motion to Dismiss:* At the end of the General Counsel's case, or at the end of hearing, there may be a motion to dismiss. The trial attorney should oppose, unless he/she agrees that the motion is well-founded (sec. 10388.4). The administrative law judge may rule on the motion forthwith. (In this connection, the general principles discussed in sec. 10438 should be observed.) The appeal should take the form of a request for review filed with the Board within 28 days and served on all parties. (See Rules, Sec. 102.27.)

10388.3 *Motion to Conform:* At the end of the hearing, the trial attorney should make a motion to conform the pleadings to the proof. Pressed for explanation or meeting with resistance, the trial attorney should note that the purpose is to dispose of minor and immaterial variances that might appear in the record, such as names, dates, and minor details. He/She should also keep in mind that this is the only effect—if substantive correction is necessary, it will not be accomplished by this motion.

10388.4 *Failure of Proof:* Where, at the end of the General Counsel's case, there has been an *unquestionable* failure of proof as to an allegation of the complaint, the trial attorney should move to strike the allegation or to amend the complaint to drop the allegation. (Where some doubt exists as to whether the allegation has been proved, the regional attorney should be consulted; if after this consultation doubt still exists, the motion should not be made.) With respect to a complete failure of proof of the allegations of the complaint, a motion to withdraw complaint would be in order. If, however, the administrative law judge treats the motion as one to dismiss, and does dismiss it, no appeal should be taken.

10390–10403 *Presentation of Evidence*

10390 *Rules of Evidence:* Section 10(b) of the Act provides that Board hearings shall, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . . ." Since the Federal Rules of Evidence, effective July 1, 1975, currently govern in Federal district courts, trial attorneys should be thoroughly familiar with these rules and Board decisions interpreting and applying said rules. Trial attorneys should also be familiar with the Rules of Evidence in the States within their Region insofar as the Federal Rules of Evidence do not control.

10392 *Stipulations:* Wherever possible, agreed-on facts should be introduced into the record in the form of stipulations. Time spent in procuring stipulations is time well spent, not only with respect to reducing the size of a record but also, on occasion, with respect to insuring that material otherwise difficult to "prove" will be in the record (secs. 10350 and 10382).

Care should be taken that the contents of stipulations are not so "conclusionary" that the administrative law judge might hesitate to adopt and follow them without "primary" foundation. For example, a stipulation that the Board has jurisdiction over the parties and the matter is worthless without a recital of supporting facts.

It is possible to enter into a stipulation on one hand but, on the other, to argue that it has no relevance. For example, to save time the trial attorney, on request or on his/her own, might stipulate that certain additional witnesses called by the respondent might testify with respect to a certain fact as others who have already testified; at the same time, he/she might argue that such testimony is irrelevant. Incidentally, the trial attorney should never stipulate that other of the respondent's witnesses would give cumulative testimony if the testimony is relevant and if there is a credibility question.

Stipulations may be written—in which case they should be introduced in a fashion similar to stipulated exhibits (sec. 10398.5)—or they may be orally stated on the record, each party then signifying his/her agreement to the accuracy of the contents and admissibility of the stipulation.

All parties, including the charging party, should be parties to each stipulation, although it *may* be fatal error to omit one party if that party has adequate opportunity to join in the stipulation or to adduce evidence to contradict or to explain parts of the stipulation. (See ***Auto Workers (Borg-Warner) v. NLRB***, 231 F.2d 237, 242 (7th Cir. 1956); cf. ***NLRB v. Haddock-Engineers, Ltd.***, 215 F.2d 734 (9th Cir. 1954).

10394 *Witnesses*

10394.1 *Separation of Witnesses:* Counsel for any party may move for separation of witnesses. The purpose of such a move would be to exclude witnesses who might be influenced in their own testimony by the prior testimony of other witnesses to the same set of circumstances or by the very presence of other witnesses (e.g., supervisors). Keeping these factors in mind, the General Counsel should exercise his/her trial discretion in initiating or opposing a separation.

If a motion for separation (sequestration) is granted, one "main representative" of each party is generally allowed to remain in the hearing room, whether or not he/she intends to testify. This usually applies to charging parties and, depending on the administrative law judge, may apply to all 8(a)(3) or 8(b)(2) cases, whether or not they themselves are charging parties.

10394.2 *Examination of Witnesses:* To the extent that occurrences at the hearing do not call for contrary action, witnesses should be called in the order planned in the trial brief (sec. 10336) and should be questioned along the lines therein indicated. The elicitation of the testimony of any given witness is a matter for advance preparation by the trial attorney; and rules for the alteration of plans carefully laid cannot be set forth out of context.

Leading questions should not be put except with respect to preliminary or immaterial matters. Nor, in this respect, should the trial attorney attempt to do indirectly what cannot be done directly, for even if he/she is able by indirect leading to introduce desired testimony into the record, he/she may be sure that the administrative law judge's faith in such testimony is shaken. A good rule to follow with respect not only to leading questions, but also with respect to other matters connected with the relationship of witness and questioner, sensibly ignores the labels of direct and cross-examination:

> The reason for the discrimination [no leading questions to one's own witnesses] is that a witness is assumed to be friendly to the party calling him/her, and will be inclined to give the answers that party desires; the witness will therefore be tempted to acquiesce in the suggestions communicated by the question. By the same token he/she will be disposed to examine all suggestions of the adverse party and to reject him/her. If it appears that these assumptions are the converse of the facts, namely, that the witness is hostile, not to the adverse party but to the party calling him/her, then the rule

that normally applies on direct examination is applied to the cross-examination and that normally applicable to cross-examination is applied to direct.

10394.3 *Rule 611(c) Federal Rules of Evidence:* Rule 611(c), Federal Rules of Evidence in pertinent part provides:

> When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The use of Rule 611(c) must be decided on a case-by-case basis. However, serious consideration to its use must be made in each case, as it may help to "pinpoint" the respondent's defenses; it may serve to procure admissions that, after hearing other evidence, the respondent may be unwilling to make; it may serve as a basis for discrediting other of the respondent's expected witnesses; it may save time with respect to proof on certain issues, such as jurisdiction and supervisory status; and it may be the only way of bringing out information peculiarly within the possession of the respondent. Certainly it should not be used unless the trial attorney has some idea of what the testimony would be. Thus, Rule 611(c) examination should be carefully prepared prior to trial and should be utilized, where possible, with an appropriate subpoena duces tecum.

10394.4 *Cross-Examination of Witnesses:* With respect to witnesses called by other parties, cross-examination is neither mandatory nor, in all cases, useful. Unless the trial attorney has a reasonably definite idea of what he/she hopes to elicit on cross-examination, he/she may find that the General Counsel's case may be injured and the case of the opponents strengthened. Still the risks of leaving the testimony unchallenged, particularly where the testimony is damaging and not susceptible of amelioration by any other means, may be even greater. The solution cannot be reduced to a formula but is resolvable only by a calculated, experienced evaluation of the overall gains and losses to be anticipated from both courses of action and the selection of that which affords the greatest potential of contributing favorably to the case with the minimum of risk. In so doing, the objects of cross-examination should be kept in mind (i.e., to impeach and to obtain admissions of fact favorable to the cross-examiner's case). In too few cases is either accomplished.

In what cross-examination he/she does engage in, the trial attorney must use an approach tailored to the witness and his/her story. He/she normally should attempt to maintain a cordial atmosphere; antagonizing or browbeating a witness, even though unchecked by the administrative law judge, may only serve to strengthen the witness in his/her story. Firmness may be called for, but sarcasm rarely serves a useful purpose. Strategically, it is said to be wise to convey the impression that the cross-examiner desires an answer different from that he/she really hopes for but it is never wise to underestimate the intelligence of a witness.

10394.5 *Objections:* It is considered good practice to keep objections to questions at a minimum. While it is important to keep testimony out of the record because it is objectionable *per se* or because it is elicited in an objectionable manner, care must be exercised so that the administrative law judge not be given the impression that there is something to hide. It should be remembered that the administrative law judge will be able to distinguish between statements that do and statements that do not have evidentiary and probative value. The trial attorney should know the rules of evidence since they are controlling "so far as practicable" at a Board hearing, and he/she should follow them in presenting his/her own and in reactions to other parties' cases, but should be mindful that technical objections that serve no useful purpose should not be made. He/she must determine in each case whether his/her objections serve a useful purpose or merely consume time.

An exception to the above exists where testimony is incompetent since failure to object on grounds of incompetence, as in the case of hearsay, may be construed as a waiver of the defect and render otherwise incompetent testimony of full probative force. 1 Wigmore, Evidence § 18 (3d ed. 1940); *Diaz v. U.S.*, 223 U.S. 442, 450 (1912). Questions of the administrative law judge are as subject to objection as questions of other parties.

When the administrative law judge has overruled an objection to a question that is one of a series along the same line, the trial attorney should ask that objection be noted to the entire line; and he/she should suggest a similar tactic to opposing counsel in applicable cases where the administrative law judge does not.

10394.6 *Use of Statements or Affidavits:* The affidavit—or, in its absence, the unsworn statement—is highly important. It can be used, in advance of a witness taking the stand, as a basis for questioning. It can be given the witness while he/she is on the stand if the witness' memory has failed him/her and the witness says that it may refresh his/her memory.

Finally, it can be used where permitted for purposes of impeachment and, in certain circumstances, may be introduced as substantive evidence. *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). See also Fed.R.Evid. 612, 613, 801, and 803(5).

Permission and consent under Sections 102.117(d) and 102.118(a) of the Rules and Regulations are hereby given (by the General Counsel with respect to documents under his/her supervision or control) for use, in C case hearings, of file material for purposes outlined above, including, where necessary, display of the materials to opposing parties and their introduction into evidence. Where use of materials is sought by parties other than the General Counsel or by anyone in a matter other than a Board hearing, express consent must be sought in accordance with Section 102.118(a). (Relative to subpoenas directed to Board personnel in any proceeding, see secs. 11820–11828.)

It should be kept in mind that in this connection some administrative law judges will allow the use of sworn but not unsworn statements; and that, if a statement or affidavit is shown to the witness, opposing counsel may look at it (strictly speaking, he/she is entitled to see it first, so that he/she may voice any objections).

10394.7 *Production of Witness' Statements for the Respondent's Counsel:* Section 102.118 of the Board's Rules governs the circumstances under which the General Counsel must produce a statement of a witness he/she has called, where such a statement is in his/her possession, in order that the respondent's counsel may use the statement for purposes of cross-examination. The rule is patterned after the Jencks' Act, 18 U.S.C. § 3500. Court decisions construing that statute may be helpful in interpreting the rule. Under the rule, on motion of opposing counsel to the administrative law judge, made after a witness called by the General Counsel has testified, the General Counsel should forthwith produce any statement or statements of the witness that are in his/her possession that relate to the subject matter concerning which the witness has testified, *and* that meet one of the following conditions:

(a) the statement was written and was signed by the witness, or was otherwise adopted or approved by him/her prior to his/her testifying, or (b) the current statement is a substantially verbatim stenographic, mechanical, electrical, or other recording, or a transcription thereof, of an earlier oral statement made by said witness to a Board agent, which was recorded contemporaneously with its making. When the original affidavit of a witness has been taken in a foreign language and the Agency has had the affidavit translated and certified in accordance with the procedures set forth in section 10059.6, the translation should also be provided to opposing counsel, as the "official" Agency translation.

If an otherwise producible statement is in the possession of another agency of the United States Government, rather than the Board, the General Counsel will undertake to request the agency possessing the statement to release it for use in the Board proceeding.

10394.8 *Opposition to Production and Resolution of such Questions:* If any of the requirements for production of a statement are not met, the General Counsel should oppose production of the statement, stating the reasons for the opposition. Where the witness' statement was written and the General Counsel contends that it was not signed, adopted, or approved by the witness, the statement should be submitted to the administrative law judge for *in camera* inspection. In some cases, opposing counsel may choose to question the witness to determine whether he/she signed, adopted, or approved the written statement. Similarly, if the witness made an oral statement to the Board agent, opposing counsel may choose to question the witness to determine whether the statement was recorded contemporaneously or whether the statement is a substantially verbatim recital of the witness' oral statement. Accordingly, during trial preparation, the General Counsel should discuss this matter fully with each prospective witness in an effort to reach a clear understanding concerning the type of statement, if any, that was given to the Board agent during the investigation.

10394.9 *Testimony of Witness in Conflict with Statement of Trial Attorney:* There is a possibility that a witness' testimony will conflict with the statement of the General Counsel. For example, when the General Counsel has stated for the record that there is no statement in the file, the witness may testify that the latter gave a statement, written or oral, to an agent of the Board, or the witness may testify, contrary to the General Counsel, that the witness did adopt or approve a written statement. In such cases, the General Counsel should request permission to interrogate the witness to determine whether the statement described in the witness' testimony is in fact producible. The interrogation of the witness may reveal that a previous oral statement was not contemporaneously recorded; that a statement is in the possession of another Federal agency, in which case the General Counsel should request the agency to release it; or that the witness never read the written statement or otherwise adopted or approved it.

10394.10 *In Camera Inspection and Excision of Unrelated Portions of Statements:* If the General Counsel believes that portions of a producible statement do not relate to the subject matter of the testimony of the witness and should be excised before delivery to the respondent's counsel, the administrative law judge should be requested to examine the statement *in camera* and designate for the administrative law judge's benefit those portions of the statement the General Counsel believes should be excised. The administrative law judge should excise those portions of the statement that do not relate to this subject matter of the witness' direct testimony. However, the administrative law judge may in his/her own discretion decline to excise matter that, although not related to the direct testimony of the witness, does relate to other matters raised by the pleadings.

10394.11 *Copies of Statements for Counsel:* Although the Board has held that the right to production of a statement does not encompass the absolute right to copy the statement (*Manbeck Baking Co.*, 130 NLRB 1186, 1190 fn. 11 (1961)), the General Counsel will provide a copy of each witness' statement that the General Counsel is required to produce to the counsel or other representative for each respondent. Where the original affidavit is handwritten and a typed copy has been made of the affidavit, copies of both will be given to the charged party. The handwritten version will be controlling and the unsigned typewritten copy will be supplied merely as a matter of convenience. The copies should be provided at the same time the original is produced (i.e., after the witness has testified) or as soon thereafter as copies can be obtained. The copies should reflect any excision of matter made by the administrative law judge in the original. If counsel for the respondent desires, said counsel may be permitted to retain the copies until the hearing is closed—including any periods of recess—provided they are utilized only for legitimate trial purposes. While the amount of time that should be afforded counsel for the charged party to review the affidavits is a matter for the administrative law judge, the Region should cooperate and offer to extend to counsel a reasonable time to review affidavits in preparation for cross-examination. After close of the hearing, the respondent's counsel must return to the General Counsel the copies of the statement, as well as any additional copies made, unless, of course, the statement has been offered in evidence.

If the Region becomes aware of any use of the statement for other than a legitimate trial purpose, for example, circulating copies around the plant and references to its contents by persons not involved in the hearing, the Division of Operations Management should be advised.

10394.12 *Statements Produced and Entered in Record:* If a respondent attempts to impeach a witness by use of a statement produced under Section 102.118 of the Board's Rules and Regulations and the questions from the respondent and the answers from the witness do not cover all parts of the statement dealing on the matters being pursued, the General Counsel should then, in order to rehabilitate the witness, have the witness reaffirm those other relevant portions of the statement and the statement should be introduced into evidence.

A novel or unusual situation involving the production of statements should be submitted to the Division of Operations Management.

10396 *Offers of Proof:* If a ruling of the administrative law judge will exclude from the record evidence that the trial attorney deems competent, material, and necessary to the proof of the case, the attorney should make an offer of proof. This will have the effect of bringing about a reversal of the ruling, limiting its scope, or, in any event, bringing to the Board's attention the precise nature of the excluded evidence.

The offer, in essence, is a statement that if the named witness(es) was (were) permitted to testify on the matter excluded, he/she (they) would testify to facts to be specified in the statement. It should set out the facts that would be testified to in detail; an offer in summary fashion or consisting of conclusions is insufficient.

An offer of proof may take the form of an oral statement on the record, a written statement to be included in the record, or, with the permission of the administrative law judge, specific questions of and answers by the witness. The oral statement would commence with, "I offer to prove by this witness that Foreman Jones said to him . . ." and would contain exact or paraphrased words that the witness would use. The written offer is usually used where it involves a whole extended line; this permits full consideration to be given to details and it saves hearing time. Rule 103(2)(b) of the Federal Rules of Evidence provides for the taking of testimony offered and rejected, in question-and-answer form. This is applicable to Board proceedings and, with the permission of the administrative law judge, it may be followed in Board cases.

It is sometimes advisable for the trial attorney to urge that offers made by the opponent take the form of question and answer. This device may reveal that the opponent's offer cannot in fact be fulfilled, and it has the added feature of "pinning down" the adverse witness.

In the event an offer of proof is made by the opposition, the trial attorney should re-urge that the evidence contained therein is irrelevant (if it is) and should demand the right of cross-examination and/or rebuttal if it should be found to be relevant. In certain instances where the offer is so broad that the trial attorney feels certain the matter could not be proven, the trial attorney may in his/her discretion either continue to urge the irrelevancy or withdraw the objection and put the party to his/her proof.

10398 *Exhibits:* Documents and records, if relevant to the issues, are introduced into the record as exhibits.

> *Caveat:* Matters of a confidential nature intended for intragency use only should never be introduced in evidence without prior Division of Operations Management clearance.

To the extent possible, exhibits should be prepared in advance (sec. 10338).

10398.1 *Identification of Exhibits:* Before introduction is sought, the trial attorney should ask the reporter to mark a document for identification. The document is then handed to the witness through whom it is being offered and, through questions and answers, is identified, authenticated, and "connected." It is then offered in evidence. At this point, on objection being made, its relevance and authenticity may have to be argued.

10398.2 *Introduction of Exhibits:* On occasion, the parties will be given the privilege of clarifying their own positions and further illuminating the record on the admissibility of an exhibit by asking voir dire questions bearing on the admissibility.

All exhibits must be introduced in the form of the original and a copy unless it is shown that the original, although authentic, is unobtainable. Afterwards, the administrative law judge will, except in unusual cases, grant leave to withdraw the original and substitute a copy therefor. (Where such arrangements are made, the person offering the exhibit assumes the responsibility for procuring the necessary copies.) Copies should also be available on request for parties.

10398.3 *Rejected Exhibits:* If the exhibit has been refused admission, the offering party may, on request, have it included among the "Rejected Exhibits."

10398.4 *Record of Exhibits:* The trial attorney should keep a running record—a good place is in the trial brief—of identification numbers of all exhibits marked, a short description of each, whether they were offered, whether they were received, and, under "Remarks," anything else that might be of value.

10398.5 *Exhibits Submitted After Close of Hearing:* Parties may be given the privilege of submitting exhibits after the close of the hearing. Numbers should be reserved for such exhibits, and the following procedure should be followed:

a. All parties should stipulate on the record that such evidence may be received after the close of the hearing and shall thereupon become part of the record.

b. A description of the document(s) that a party proposes to offer should appear as part of the stipulation in the record and an appropriate exhibit number should be reserved.

c. Ordinarily the trial attorney should reserve the right to inspect the documents when they are offered and to file objections, and this right may be reserved by all parties.

10398.6 *Custody of Exhibits:* Custody of exhibits once received (or placed among the rejected exhibits) is in the official reporter. He/She is responsible for their safekeeping during and between hearing sessions, and will not turn them over to any party except upon direction by the presiding officer, in which case the reporter will be furnished a receipt. After the hearing is closed, the reporter will forward both copies of exhibits to the Regional Office, which will forward the originals to Washington on the same day they are received. If a hearing has been *indefinitely* adjourned, the reporter will transmit the exhibits to the Region, to be handled in like manner as if the hearing was closed. On resumption of the hearing, the exhibits will be returned to the Regional Office by Washington (if and when requested by the Regional Office) for return to the reporter for the duration of the hearing.

When a hearing is adjourned to a specified date, the reporter shall retain in his/her custody all exhibits in the case. If such hearing should be subsequently adjourned indefinitely, the exhibits will be forwarded to the Regional Office as above.

10400 *Requests to Produce*

10400.1 *Request by Opposing Counsel:* Whenever opposing counsel demands the production of statements, affidavits, or documents in possession of the Region or of the trial attorney, the demand should be rejected except in the following situations:

a. Where a witness has been given or is about to be given the document to refresh his/her memory, or to impeach his/her testimony (sec. 10394.6).

b. Where the General Counsel has granted advance permission. (But see secs. 10394.7 and 10398, *caveat.*)

Where the demand is followed up with service of a subpoena, see sections 11820–11828.

Where the administrative law judge upholds the demand over objection of the General Counsel, the regional attorney should be consulted as to what further appropriate action should be taken.

10400.2 *Request by Trial Attorney:* The trial attorney may, at the hearing, either request the production of a document believed to be in the possession of the respondent or subpoena the document. Whenever the trial attorney has secondary evidence in his/her possession, a notice to produce may be of greater tactical advantage than a subpoena. This is true where a respondent offers strenuous resistance and might refuse to comply with a subpoena in order to gain the extra time that it would take to secure enforcement. Under such circumstances, it would be a distinct advantage to resort to the notice to produce instead of the subpoenas, since a failure to produce following service of a notice to produce would provide the necessary foundation for introduction of the secondary evidence. The same thing could be accomplished by serving a subpoena and, on refusal of the subpoenaed party to comply, issuing a notice to produce at that time.

It may be that this sequence of events might sometimes occur even though it might not be so planned. To the extent, however, that the attitude of the parties indicates it is unlikely that a subpoena will be honored, it is better not to serve the subpoena at all, but instead resort to the notice to produce. It is generally unwise for Board personnel to issue subpoenas unless there is a willingness to seek enforcement. Otherwise, a promiscuous use of subpoenas, which are not honored and not enforced, may lead to a weakening of the subpoena process and a disregard of the Board's authority and effectiveness in administering the Act.

10402 *Evidence of Settlement Negotiations:* The fact that settlement offers were made or discussed is normally inadmissible. The trial attorney should not introduce such evidence and should resist attempts of others to introduce it.

On the other hand, *admissions of fact* made at any time are admissible. (The difficulty here, of course, is usually proof.) They may be put upon the record either as affirmative evidence or for purposes of impeachment. However, such evidence should not be used where substitute evidence is available. Also, the use of such evidence should be tempered by consideration of the general policy against testifying by Board personnel (see Subpoena of and Testimony by Board Personnel, secs. 11820–11828).

10403 *Background Evidence; Use of Presettlement Conduct:* In cases involving postsettlement unfair labor practice allegations, activity prior to a settlement agreement may be considered in establishing the motive or object of a respondent in its postsettlement activities. (See *Northern California District Council of Hodcarriers (Joseph's Landscap-*

ing), 154 NLRB 1384 (1965), which overrules this aspect of *Larrance Tank Corp.*, 94 NLRB 352 (1951).)

10404 *Appeals to Board:* Rulings by the administrative law judge on motions or on objections, and orders in connection therewith, may not be appealed directly to the Board except by special permission of the Board. Requests for such permission should be made promptly in writing, a copy served on each other party, and on the administrative law judge.

The trial attorney, unless the ruling destroys a substantial part of his/her case, should not request such special permission if it will delay the proceedings more than a half day. If he/she can request permission and simultaneously proceed with the case, he/she should do so.

The request for special permission to appeal should succinctly state the ruling, the surrounding circumstances, and the grounds urged for reversal.

A copy should not be sent to the Division of Operations Management.

If opposing counsel signifies a desire to seek special permission to appeal a ruling of the administrative law judge, delay in the hearing exceeding the time necessary physically to prepare the appeal—say, up to one-half day—should be resisted. When the request has been filed, the discretion of the trial attorney should be exercised in determining whether an opposition should be submitted.

10406 *Postponements:* One or another of the parties may desire a postponement (continuance, adjournment, or recess) at any point during the hearing. Power to grant such requests rests in the administrative law judge who will act favorably only on a showing of good cause. (See sec. 11872 on hearing costs.)

The trial attorney is expected to be ready to proceed with the case at the time finally fixed. Therefore, except on rare occasions, he/she should have no occasion to request a postponement. (See sec. 10294.)

10406.1 *Requested Because of Lack of, or Newly Acquired, Counsel:* If the ground given for a postponement request is the lack, to this date, of counsel, the request should be opposed since counsel could and should have been procured by now. If the asserted ground is the entry into the case of counsel so recently as to obviate his/her having knowledge of the facts, a delay of more than a few hours should be opposed. Similar action should be taken where a newly acquired counsel pleads prior commitments. In all such cases, the trial attorney will accord whatever professional courtesies are due fellow attorneys.

10406.2 *Requested Because of "Surprise" Development; Amendment of Complaint:* A most common ground urged as cause for a continuance is the necessity for further investigation occasioned by "surprise" developments. For example, should the General Counsel be successful in an attempt to amend the complaint (sec. 10274), the respondent may seek a postponement to "look into" the matters newly alleged. In such a case, the delay should be resisted if there is room for argument that surprise does not exist, or if, in fact, the respondent can "look into" the newly alleged matters while simultaneously proceeding with the rest of his case; but the resistance should be tempered with a regard for the principles of due process. Generally, administrative law judges incline to liberality where adequate notice to the respondent is involved, a factor of which the trial attorney should be cognizant in all of his/her actions. The amount of advance notice, as well as the nature of the amendment, will determine both the administrative law judge's attitude with respect to delay in the hearing and with respect to time allowed for answering the new allegations.

(Answers to allegations newly added to a complaint during hearing may take the form of prehearing answers (sec. 10280.4), or may, with the administrative law judge's permission, consist of interlineations on the face of the original answer, or may be stated orally on the record.)

10406.3 *Requested to Prepare Defense:* Another common type of postponement request is the request for an adjournment between the closing of the General Counsel's case and the opening of the defense. It may be argued that, however one prepares a defense, one cannot anticipate all that might be presented in a case in chief. The trial attorney should resist any such continuances, arguing (if true) that the pleadings, settlement discussions, and underlying investigation should have placed the respondent on notice of the issues to be tried.

10406.4 *Necessitated by Other Matters:* Delays necessitated by other matters—appeals to the Board, subpoena enforcement proceedings—should, to the extent the trial attorney has any power, be kept to a minimum.

The necessity for a postponement may be dissipated by the passage of time. Often, upon a suggestion that the hearing proceed in those aspects in which progress is possible, the postponement request may be withdrawn and never renewed.

10407 *Remedy Sought*

10407.1 *Statement on Record:* On the completion of testimony by all parties at the hearing, the trial attorney may state on the record his/her recommendation as to the precise remedy sought. If an unusual remedy is recommended, the trial attorney may provide the administrative law judge and the other parties with a copy of the proposed order in writing.

Alternatively, if the Region decides to avoid specificity, the trial attorney should state the desired remedy in broad language. In either case, he/she should state fully the Region's reasons for recommending the special remedy.

Obviously, not every case will lend itself to strict adherence to this requirement and, for this reason, the Regions are granted broad leeway to decide whether and when to recommend a remedy and to decide on the method of presentation (i.e., oral or written).

10407.2 *New Development Requiring Reconsideration:* From time to time, new developments at a hearing may surprise trial counsel and require reconsideration of the remedy counsel had planned to propose. In such situations, trial counsel should not insist on pressing on the administrative law judge a remedy that does not take into account the new facts developed at the hearing. Counsel should advise the administrative law judge either that the proposed remedy will be included in his/her brief (if one is to be filed), or in a memorandum to the administrative law judge and the parties. In all cases, however, the trial attorney should allow himself/herself latitude for reviewing the record and modifying his/her recommended remedy to accord with the record.

10407.3 *Proposed Remedy Not a Limitation:* By recommending a specific remedy, it might be concluded that the trial attorney was thereby limiting himself/herself to the recommended relief as a maximum attainable. This could have the disadvantage of placing a ceiling on the relief to be secured and possibly of limiting the latitude of the administrative law judge and the Board in expressing their views concerning remedies more extensive than that recommended by the trial attorney. Trial counsel should be careful to explain to the administrative law judge that the recommended remedy is not to be construed as a limited request, but as a suggested remedy for the unfair labor practices known by the trial attorney to have taken place and is based on the facts as he/she views them and the theory as propounded. Counsel should make it clear that, if the administrative law judge and the Board, as a result of their substantive conclusions and findings, arrive at a view of the case that is different from that of the trial attorney, the recommendations of the trial attorney should be construed in the light of the changed factual background. In any event, the trial attorney should be careful to request the administrative law judge to provide "any further relief as may be appropriate."

A similar problem is raised where the administrative law judge finds adversely as to some of the facts on which the Region's remedy is predicated. The trial attorney normally should not attempt to anticipate, in his/her recommended remedy, any rejection by the administrative law judge of any part of the case, for to do so would entail recommending a variety of alternate remedies. This practice could create problems in complex cases and may have the effect of weakening the trial attorney's position. The trial attorney will have an opportunity to except to any inappropriate findings or recommendations of the administrative law judge after the issuance of a decision and can modify the proposed remedy in the exceptions if this is believed to be advantageous.

10407.4 *Charging Party Seeks Different Remedy:* It is assumed that trial counsel at all times will, in the course of his/her relations with the charging party, iron out in advance of hearing any problems and differences in point of view. However, in the event that prehearing agreement concerning remedy cannot be reached, the trial attorney should proceed to announce the Region's recommendation concerning the remedy to the administrative law judge at the close of the hearing notwithstanding the charging party's position. The charging party will have an opportunity to explain its views to the administrative law judge, on exceptions to the administrative law judge's decision, or on appeal from the Board's order.

10407.5 *Possible Change in Circumstances After Hearing:* Although a full investigation is conducted prior to hearing by the Regional Office concerning the facts underlying the recommended remedy, these circumstances may change drastically between the date of the hearing and the time compliance is undertaken. The changes in circumstances may be so broad as to render the remedy inapplicable in whole or part by the time compliance is secured. Trial counsel should at all times be alert to this possibility in framing special remedies. If there is a possibility that changes in production methods, location of the respondent's plant, and changes in product will take place after hearing, the trial attorney should be careful to state the recommended remedy in broad terms. Thus, the advantages of the dual nature of the Board's remedial processes (i.e., proof of the ULP at the hearing with a remedy allowing adequate latitude for compliance and a possible second hearing on compliance matters), will be preserved (but see below). Care should be sedulously exercised to avoid overlooking a necessary remedy because of a belief that remedial action was completed before hearing. For example, the trial attorney may be under the impression, at the time of hearing, that discriminatees had been reinstated. Taking this into consideration in the formulation of the remedy, counsel might not believe it necessary to request a reinstatement provision. However, subsequent events could disclose that the apparent reinstatement was in fact not bona fide thus leaving the General Counsel without an appropriate remedial order.

Following the hearing and prior to the transfer of the case to the compliance officer, the trial attorney should continue to monitor the respondent's ability to comply with the requested remedy and be alert to changed circumstances. Due to the passage of time between the hearing, the issuance of the administrative law judge's decision, and the eventual Board order, charging party and witnesses whose remedial rights may be affected by a change in the respondent's operation, identity, or financial condition should be contacted regularly during this period of time and requested to contact the trial attorney concerning any such changed circumstances. (See secs. 10064.6, 10257, 10274.4, 10334.1, 10528.16, and 10643.) Frequently, time is of the essence, and appropriate protective action should not await transfer of the case to compliance.

10407.6 *The Respondent's Reaction to Proposed Remedy:* The injection of remedial issues at the close of the hearing may result in a plea of surprise by the respondent and a consequent request that the hearing be reopened to permit it to offer evidence bearing on the nature or scope of the recommended remedy. Consideration should be given to including a "prayer for relief" paragraph in the complaint to avoid this eventuality. The trial attorney should make no effort, ordinarily, to prevent the respondent from introducing *relevant* testimony or evidence concerning remedy issues. One of the principal advantages of this program will be the making of an appropriate record concerning such issues. Argument and the introduction of appropriate testimony and evidence by all parties will accordingly enhance the record in this respect and facilitate the development of appropriate remedies by the Board and their enforcement in subsequent court proceedings. This is not, however, to be construed as a blank check to those respondents who may endeavor to delay Board hearings with irrelevant, inappropriate, or extended debate concerning the remedy, which does nothing to contribute to a fuller record.

10408 *Oral Argument:* The trial attorney should be prepared to argue orally in every case and should do so when the administrative law judge requests oral argument or when the General Counsel's case can be effectively presented through the use of oral argument. In preparation for the hearing, a detailed outline of the factual presentation should be prepared together with an outline of the legal argument with case citations, as appropriate. During the hearing, the trial attorney should be particularly sensitive to the administrative law judge's grasp of the General Counsel's theory. If it appears that further elucidation is needed, an oral argument should be made as to the issues warranting clarification, including any complex or novel legal principles in issue. In addition to appropriate cases presenting legal issues, cases that may be argued orally include cases involving less complicated factual issues.

10409 *Close of Hearing:* Before the hearing finally closes, the trial attorney should check through his/her trial brief to make sure all details have been dealt with.

Counsel should make his/her motion to conform the pleadings to the proof (sec. 10388.3).

Counsel should take certain steps with respect to exhibits. He/She should assure himself/herself that all exhibits intended to be offered were offered, not merely marked for identification; all offers were ruled on; all duplicates were supplied; the reporter in fact has all the exhibits; and all parties understand arrangements, if any, as to submission of exhibits after the close of hearing.

Immediately after close of hearing, the trial attorney should complete Report and Obligated Cost, Form NLRB-4237, as instructed in section 11872.

Where during the trial opposing counsel sought production of statements given to our agents, if a novel or unusual situation is involved, or if for any reason the Regional Director wishes to call attention to the case, the trial attorney should prepare a summary report for the Division of Operations Management.

10410 *Briefs to Administrative Law Judge:* (Although, technically, briefs to administrative law judges are filed after the close of a hearing, they are in a real sense an extension of the hearing. Therefore, their treatment appears under "The Hearing.") The desirability of oral argument as opposed to a brief is discussed in section 10408. An example of a situation calling for a brief instead of or in addition to oral argument is one involving lengthy testimony with numerous or difficult to follow legal principles. Also complex credibility issues may be more effectively presented in a brief. Additionally, even though an oral argument is made, the presentation of some cases may be enhanced by advance preparation of a brief legal memorandum to present to the administrative law judge and the parties at the hearing.

A brief, if filed, should be succinct. It should treat primarily with the points that may trouble the administrative law judge. The points made should, in the usual case, be summarized at the beginning of the brief.

If trial counsel's review of the record discloses that new facts were developed at the hearing that require modification of the proposed remedy, this may be accomplished through a short memorandum or brief to the administrative law judge.

An original and two copies of a brief should be filed with the administrative law judge, a copy being served on each other party. Time limits set by the administrative law judge—see Section 102.42 of the Rules and Regulations—should be met.

Although the brief becomes part of the record, the master copy of the brief should be preserved since additional copies may have to be submitted with future exceptions to or statement supporting the administrative law judge's decision (see sec. 10438).

10412 *Correcting the Transcript:* Since the administrative law judge's decision and further proceedings will be based on the record, it is important that the record be accurate. Even though the hearing may not have concluded, the trial attorney should carefully read the transcript of testimony as it is delivered. He/she should note all material inaccuracies and take all necessary steps to correct the transcript. Corrections may be made by stipulation or by motion (this is the order of preference) presented to the administrative law judge or, after the case has been transferred, to the Board. If filed with the administrative law judge, the original and four copies of the stipulation or motion should be submitted; if filed with the Board, eight copies are required. In either instance, copies should be served on each of the parties and proof of such service furnished.

The purpose of correcting the transcript is not to correct mistakes actually made at the hearing, but to insure that the testimony of witnesses and the statements of counsel and the administrative law judge are accurately reflected in all material respects.

10430–10444 *Posthearing*

10430 *Administrative Law Judge's Decision:* The administrative law judge may grant a motion to dismiss at the hearing itself. For discussion of the procedure to be followed in such cases, see section 10388.2. The administrative law judge's ultimate decision on the merits is based on full consideration of the written record. After the close of the hearing and submission of briefs, the administrative law judge issues a decision that sets forth his/her findings of fact, legal conclusion, and recommended remedial action. Simultaneously, the Board issues an order transferring the case to the Board, thereby divesting the administrative law judge of all jurisdiction.

On receipt of the administrative law judge's decision, the trial attorney should review the remedy and the facts found by the administrative law judge. If the administrative law judge fails to follow the General Counsel's proposed remedy without good cause, appropriate exception might be called for. If the remedy is adopted, but all the facts necessary to support it are not found, then exceptions would lie to the deficiencies in findings of fact. Trial attorneys should not adopt a policy of excepting automatically in all cases where their remedies have not been adopted by the administrative law judge. The factual situation created by the final record may be such as not to support the recommended remedy. In considering whether or not to file exceptions, the trial attorney should view the record as a whole and determine whether or not the administrative law judge has ruled as extensively as permitted by the record.

The trial attorney should continue to monitor the respondent's ability to comply with the remedial provisions of the judge's decision and any changed circumstances with respect to the respondent's operation, identity or financial condition. (See secs. 10407.5 and 10505). In the event that the trial attorney is unavailable, the responsibility should be assigned to another Board agent.

10430.1 *Analysis of Administrative Law Judge's Decision:* Within 10 days following the issuance of an administrative law judge's decision, an analysis should be submitted to the Division of Operations Management. Where Washington authorization was obtained prior to issuance of a complaint, two copies of the analysis should be submitted to Washington. One copy should be marked for the branch that authorized the complaint, containing the following information:

a. Case name and number

b. Name of counsel for the General Counsel

c. Date of original charge (do not include amendments)

d. Date of original complaint (do not include amendments)

e. Inclusive dates of hearing

f. Date of administrative law judge's decision

g. Name of administrative law judge

h. If Washington authorization, clearance, or advice was involved, state whether given by the Division of Advice, Office of Appeals, or Division of Operations Management.

i. Set forth the allegations of the complaint by section number (e.g., 8(a)(1), 8(a)(3), 8(b)(2), 8(b)(4)(ii), 8(b)(7)(C)). Note whether the 8(a)(1) is derivative or independent or both.

j. State results generally (e.g., whole case won, whole case lost, partial loss).

k. If whole case lost, or if only part of case lost, comment on the reasons therefor. In determining whether a significant portion of a case is lost, consideration should be given not only to the findings as to each allegation of the complaint, but also to the adequacy and appropriateness of the administrative law judge's proposed remedy.

l. State whether or not the Region intends to file exceptions, including reasons, legal grounds, and a self-explanatory analysis of the basis for intention. In this connection, if changes in the theory or substance of a case have occurred at the hearing or have not been previously reported to the Division of Operations Management (i.e., amendments, dropping of individual 8(a)(3)'s, etc.), and if these changes are not clearly reflected in the administrative law judge's decision itself, they should be reported and explained.

If the administrative law judge's decision embodies novel or complex policy questions, the Region should notify the Division of Operations Management of any intended action. This notification should be sent whether or not the Region believes that exceptions should be filed. Further action should await advice from the Division of Operations Management.

10432 *Notice to the Board with Respect to Exceptions:* The General Counsel should notify the Executive Secretary as soon as possible whether he intends to file exceptions.

10434 *Compliance with Administrative Law Judge's Decision:* As indicated earlier (sec. 10430.1), the Region must decide and advise the Division of Operations Management whether exceptions to the administrative law judge's decision will be filed by the General Counsel. If it is decided that no exceptions will be filed, compliance efforts should be initiated.

If full compliance has been effected, the Region should follow the procedure set forth in Compliance—Reporting, sections 10772–10772.3.

10438 *Exceptions/Brief Supporting Administrative Law Judge's Decision/Request for Oral Argument:* All exceptions and briefs must be timely filed and must comply fully with Section 102.46 of the Board's Rules and Regulations.

10438.1 *Preparation of Exceptions:* The purpose of Section 102.46(b) of the Board's Rules and Regulations, relating to exceptions and briefs, is to enable the Board to determine specifically what issues of substance or procedure it is being asked to decide. The exceptions and briefs in support of exceptions should therefore, when read together, make clear what those specific issues are (*Stop & Shop*, 161 NLRB 75, 76 fn. 1 (1966)). When both exceptions and briefs are filed, argument and citations to legal authority and references to the record set forth in one such document need not be duplicated in the other (*Fashion Fair*, 163 NLRB 97, 98 fn. 1 (1967)). These documents should also make clear where the discussion of each such issue may be found in the administrative law judge's decision; where in the hearing transcript the evidence may be found, if an issue of fact is involved, to support the position being urged; where, if not in the administrative law judge's decision, a disputed ruling may be found; and what reasons are relied on to support such position, including citations of authority.

Broad general exceptions, which do not clearly identify the issues, are not acceptable (*Pat Izzi Trucking Co.*, 149 NLRB 1097 (1964), affd. 343 F.2d 753 (1st Cir. 1965)). The Rules, however, do not require that every page and line of the administrative law judge's decision be cited in order to identify and preserve an issue. The Rules require the party filing exceptions to "identify that part of the administrative law judge's decision to which objection is made," and to "state the grounds for the exceptions," including "the citation of authorities." The Rules require more specificity only where it is necessary to refer to the hearing transcript to support an exception; in that event, the party is required to designate specific page references to the portions of the record relied on.

The trial attorney should remember that, even though he/she has made an offer of proof, he/she must file an exception with the Board to the administrative law judge's adverse ruling with respect thereto, should he/she wish to preserve that issue before the Board. The same is true with respect to all adverse procedural or substantive rulings made at the hearing or in the administrative law judge's decision.

As stated above, where both exceptions and briefs are filed, argument and citations to legal authority and references to the record set forth in one such document need not be duplicated in the order.

As an example, a bare exception to an administrative law judge's finding that the respondent did not violate Section 8(a)(1) or 8(b)(1)(A) of the Act would be deemed insufficient. On the other hand, an exception to the administrative law judge's finding that the respondent did not violate Section 8(a)(1) or 8(b)(1)(A) of the Act by, for example, threatening employees with discharge would be deemed sufficient (a) if the exception identifies, by page or section, the place in the administrative law judge's decision where the finding in issue may be found; (b) if the accompanying brief clearly sets forth the basis for the exception (i.e., credibility, weight of evidence, misapplication of precedent, ruling of the administrative law judge, or whatever else may be involved); and (c) if the brief contains the citations to the transcript that afford the evidentiary support for the exception, or reflect the disputed ruling, and any relevant legal authorities. If no brief is filed, then this material must be included in the exceptions.

10438.2 *Filing of Exceptions:* If a party, including the General Counsel, feels that any material part of the administrative law judge's decision is erroneous, and should not be adopted as part of a Board order, he/she may make those contentions to the Board in the form of a written statement of exceptions.

Eight copies must be filed with the Board, and one copy should be served immediately on each of the other parties. Each copy should be accompanied by a brief in support of the statement of exceptions.

No copy need be sent to the Division of Operations Management.

10438.3 *Time Within Which to File Exceptions:* Section 102.46 of the Rules and Regulations provides that the exceptions must be filed within 28 days of service of the order transferring the case to the Board, unless an extension is granted. (See Rules, Sec. 102.46.)

Note that where a motion in the nature of a motion to dismiss the complaint in its entirety is granted by the administrative law judge before the issuance of a decision, the proper procedure is to file a request for review and such request must be filed within 28 days from the date of the order of dismissal. (See Rules, Sec. 102.27.)

Where necessary, extensions should be requested of the Board—*not* to or through the Division of Operations Management—at least 3 days before exceptions are then due. Where the order has been served by mail (as it usually is), the exceptions are due to arrive at the Board in Washington before the close of business on the 23d day after mailing of the order, not counting the date of mailing. (See Secs. 102.111–102.114, Rules and Regulations.) Consideration should be given to the fact that routing in Washington may consume a full day, and the Region should mail exceptions so that they will arrive at least a full day before due. (When a party that has missed its deadline can show that the exceptions were mailed in reasonable time for the document to have been timely received, the Board will consider the exceptions. But the burden of showing deposit in the mails sufficiently in advance of the deadline to give the party the right to expect timely delivery is on that party.)

10438.4 *Responsibility for Determination and Preparation of Exceptions:* Ordinarily, in considering what its order will be, the Board will consider only those matters raised in the exceptions; and, at any rate, no matter not urged in the exceptions may thereafter be raised in any further proceedings.

The utmost care must be exercised in the analysis of the administrative law judge's decision and the necessity and nature of exceptions. The task of analysis will be that of the trial attorney, unless a contrary assignment is made. Where personnel from Washington or other Regions have tried the case, a "home" attorney should be assigned, unless there is a clearance to the contrary.

Normally, responsibility for determining whether exceptions should be filed rests with the Region.

EXCEPTIONS: Where complaint was authorized by any division or branch in Washington, the Region should make a recommendation to that branch or division as to the filing of the exceptions. (This should be done promptly so that a decision can be made within the time for the exceptions to be filed.) Where the theory of the desired exception is other than that on which the case was originally tried, or where a new and novel issue is involved, clearance should be obtained from the Washington division that authorized complaint.

Restraint should be exercised in the filing of exceptions. They should not be filed merely as an attempted justification for the original action;

they should only be filed when they have reasonable possibilities of success. Credibility findings, which are difficult to upset, should be attacked only under favorable circumstances; e.g., where, according to the administrative law judge, the findings were based on a "logical analysis" of the facts testified to rather than demeanor; where "demeanor" findings clash with logic or pattern; where the findings are mutually inconsistent; and where all testimony, on the face of the administrative law judge's decision, was not considered.

Exceptions to a *favorable* administrative law judge's decision should be filed only where it contains errors on its face; the rationale needs bolstering; or the recommended remedy is inappropriate or inadequate.

10438.5 *Answering Briefs; Cross-Exceptions:* See Rules and Regulations, Section 102.46.

10438.6 *Request for Oral Argument:* A request for oral argument before the Board should be filed, if at all, along with the exceptions.

The Region should not request argument without clearance from the Division of Operations Management.

10438.7 *Brief in Support of Administrative Law Judge's Decision:* A brief in support of an administrative law judge's decision may be filed by any party. (The number of copies and service are the same as those relating to exceptions.)

This should be infrequently used, although there are occasions when it may be good strategy (e.g., in attacking limited credibility findings) to file combined exceptions-and-support, making it perfectly clear that, while certain findings are being attacked, other findings are amply supported by the record.

10442 *Oral Argument Before Board:* If oral argument is ordered by the Board, the Division of Operations Management should be notified. Consultation between the Division of Operations Management and the Region will determine who will argue, the nature of the argument, and related details.

10444 *Posthearing Motions:* Motions filed by any party after the close of the hearing but before transfer to the Board should be filed with the administrative law judge.

After transfer to the Board, motions should be filed with the Board. File eight copies of such motion; they should be legibly printed or duplicated (no carbon copies).

(See secs. 10412 and 10452.)

10450–10452 *Board Order*

10450 *Issuance:* In the event no exceptions have been filed, the Board will issue an order adopting the administrative law judge's findings, conclusions, and recommendations.

Within 10 days following issuance of the Board order, an analysis should be submitted by the Region to the Division of Operations Management similar in form to that submitted on issuance of the administrative law judge's decision (sec. 10430.1).

Where exceptions are filed, the Board may decide the matter forthwith on the record or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make any other appropriate disposition of the case.

10452 *Motions for Reconsideration:*

a. The Regional Office should not file a motion for reconsideration without prior clearance with the Division of Operations. The recommending memo should set forth not only the reasons for the recommended action but also the substance of the proposed motion.

b. Where appropriate and necessary, within the discretion of the Region, opposition to other parties' motions for reconsideration should be filed. However, where new or novel legal problems are involved, prior clearance should be requested of the Division of Operations Management.

c. Should a respondent file a motion for reconsideration with the Board, after the Region has recommended enforcement, the Region should notify the Appellate Court Branch promptly.

11700–11886 *Items Common to all Cases*

11700–11714 *Jurisdiction*

11700 *Jurisdictional Standards:* The Board's jurisdictional standards existing on August 1, 1959, have been incorporated into the statute as defining the extent to which the Board might in its discretion decline to exercise its legal jurisdiction. Pursuant to Section 14(c)(1), these standards may be modified provided that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

11702 *Advisory Opinions:* Under certain circumstances the Board will make a preliminary determination as to whether it would assert jurisdiction over the parties to a particular controversy. (a) Whenever a party to a proceeding before any agency or court of any State or territory is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards, the party may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction on the basis of its current standards. (b) Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. A copy of the petition should be *served* on the Regional Director—the Region should not act as transmission agent of the original petition to the Board. (See Secs. 102.98–102.104 of the Board's Rules and Regulations and Secs. 101.39–101.41 of Statements of Procedure.)

11702.1 *Intervention in Advisory Opinion Proceedings:* Whenever a petition for an advisory opinion is served, if the Regional Director is in possession of jurisdictional facts, secured during the investigation of a prior or current C or R case and he/she believes such facts would assist the Board in rendering its advisory opinion, the Regional Director should move to intervene in the advisory opinion proceeding.

When appropriate the Regional Director should:

a. Move to intervene in the advisory opinion proceeding pursuant to Section 102.102 of the Rules and Regulations.

b. Submit to the Board with his/her motion the jurisdictional facts contained in the investigatory file, after having conducted any necessary additional investigation as to jurisdiction. If the case is closed, however, no further investigation should be conducted unless the Board so requests.

c. In accord with Section 102.113(b) of the Rules, serve copies of the motion to intervene and jurisdictional facts on the state court or agency and the parties to the state proceedings.

d. Advise the parties so served that pursuant to Section 102.101 of the Rules, they have 14 days after service thereof within which to make a response.

e. File eight copies of the motion to intervene, together with the jurisdictional information.

11704 *Declaratory Orders:* When both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office, and there is doubt as to whether the Board would assert jurisdiction over the employer involved, the General Counsel may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases.

If the Regional Director is of the opinion that a declaratory order should be sought, he should prepare a petition containing the allegations required by Section 102.106 of the Board's Rules and Regulations. The eight copies of the petition, plus sufficient additional copies for service on all parties, should be submitted to the Division of Operations Management with a transmittal memorandum setting forth the Region's recommendations. An affidavit of service, original and two copies, containing the names and addresses of all parties involved in the unfair labor practice and representation cases should also be prepared in the Region and submitted with the petition.

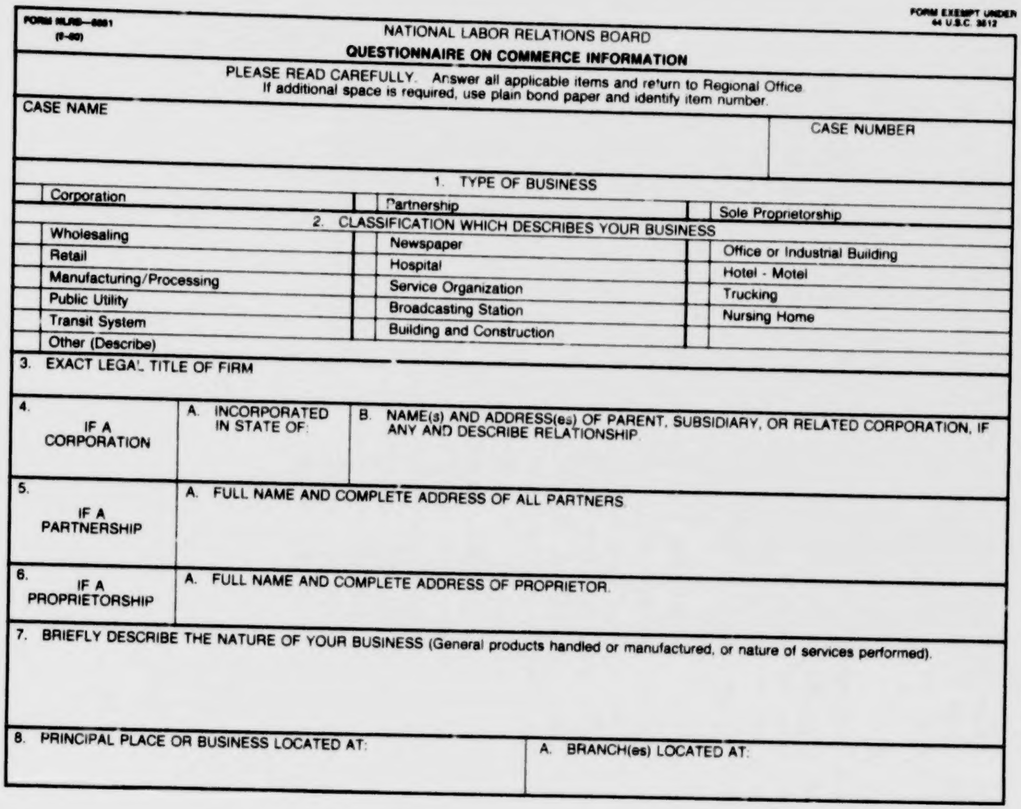
If the petition is deemed appropriate, the General Counsel will sign it, file it with the Executive Secretary of the Board, serve a copy of the petition on each of the parties involved, complete the affidavit of service, and notify the Region by means of a conformed copy of the affidavit of service.

(For proceedings following the filing of the petition see Secs. 102.108–102.110 of the Board's Rules and Regulations, and Sec. 101.43 of the Statements of Procedure.)

11706 *Investigation:* Among the earliest determinations to be made are whether the employer is an "employer" under the Act and whether, applying current Board standards, the alleged unfair labor practices or question concerning representation "affect commerce." Charges or petitions deficient in either of these respects should be dismissed absent withdrawal.

11708 *Obtaining Commerce Information from Employer:* Normally, commerce information is furnished by the employer involved. In a CA case, in an R case, or in a UD case an appropriate questionnaire is sent the employer with the initial letter; in all other cases, a similar questionnaire should be sent at an early date by the assigned Board agent. Questionnaires should be tailored to fit the circumstances of the case. It is important to note that the use of such questionnaires in some cases will be only the beginning point of the jurisdictional investigation; where further investigation is necessary, of course, it must be undertaken. This is particularly true in CA cases where the returned questionnaire indicates that the employer falls just a little short of the jurisdictional standards and in cases against labor organizations, or some R cases, where the Board's jurisdiction may be contested by the respondent or an intervenor, respectively.

11708.1 *Commerce Questionnaire*



FORM NLRB—5081
([illegible])

FORM EXEMPT UNDER
44 U.S.C. 3512

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

PLEASE READ CAREFULLY. Answer all applicable items and return to Regional Office.
If additional space is required, use plain bond paper and identify item number.

CASE NAME

CASE NUMBER

1. TYPE OF BUSINESS

☐ Corporation	☐ Partnership	☐ Sole Proprietorship

2. CLASSIFICATION WHICH DESCRIBES YOUR BUSINESS

☐ Wholesaling	☐ Newspaper	☐ Office or Industrial Building
☐ Retail	☐ Hospital	☐ Hotel - Motel
☐ Manufacturing/Processing	☐ Service Organization	☐ Trucking
☐ Public Utility	☐ Broadcasting Station	☐ Nursing Home
☐ Transit System	☐ Building and Construction	☐
☐ Other (Describe)		

3. EXACT LEGAL TITLE OF FIRM

4. IF A CORPORATION	A. INCORPORATED IN STATE OF:	B. NAME(s) AND ADDRESS(es) OF PARENT, SUBSIDIARY, OR RELATED CORPORATION, IF ANY AND DESCRIBE RELATIONSHIP.
5. IF A PARTNERSHIP	A. FULL NAME AND COMPLETE ADDRESS OF ALL PARTNERS.	
6. IF A PROPRIETORSHIP	A. FULL NAME AND COMPLETE ADDRESS OF PROPRIETOR.	

7. BRIEFLY DESCRIBE THE NATURE OF YOUR BUSINESS (General products handled or manufactured, or nature of services performed).

8. PRINCIPAL PLACE OR BUSINESS LOCATED AT:

A. BRANCH(es) LOCATED AT:

9. NUMBER OF PERSONNEL PRESENTLY EMPLOYED BY YOUR FIRM	A. TOTAL	B. AT THE ADDRESS INVOLVED IN THIS PROCEEDING

10. DURING THE PAST ☐ CALENDAR, ☐ FISCAL YEAR (If Fiscal Year indicate dates) OR ☐ LAST 12 MONTHS (Check appropriate box):

A. DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES DIRECTLY TO CUSTOMERS OUTSIDE THE STATE EXCEES $50,000 ☐ YES ☐ NO IF LESS THAN $50,000 INDICATE AMOUNT	$
B. DID GROSS AMOUNT OF PURCHASED OF MATERIALS OR SERVICES DIRECTLY FROM OUTSIDE THE STATE EXCEED $50,000 ☐ YES ☐ NO IF LESS THAN $50,000 INDICATE AMOUNT	$
C. DID GROSS REVENUE FROM YOUR SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO FIRMS WHICH DIRECTLY MADE SALES TO CUSTOMERS OUTSIDE THE STATE AND/OR TO CUSTOMERS WHICH MADE PURCHASES FROM DIRECTLY OUTSIDE THE STATE ☐ YES ☐ NO IF LESS THAN $50,000 INDICATE AMOUNT	$
D. IF THE ANSWER TO 10(c) IS NO, DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO PUBLIC UTILITIES, TRANSIT SYSTEMS, NEWSPAPERS, HEALTH CARE INSTITUTIONS, BROADCASTING STATIONS, COMMERCIAL BUILDINGS, EDUCATIONAL INSTITUTIONS AND/OR RETAIL CONCERNS ☐ YES ☐ NO IF LESS THAN $50,000 INDICATE AMOUNT	$
E. DID GROSS AMOUNT OF YOUR PURCHASES EQUAL OR EXCEED $50,000 FROM FIRMS WHICH IN TURN, PURCHASED THOSE GOODS DIRECTLY FROM OUTSIDE THE STATE ☐ YES ☐ NO	$
F. GROSS REVENUE FROM ALL SALES OR PERFORMANCE OF SERVICES (Check largest amount which firm equaled or exceeded): ☐ $100,000 ☐ $200,000 ☐ $250,000 ☐ $500,000 ☐ $1,000,000 IF LESS THAN $100,000 INDICATE AMOUNT	$

11. ARE YOU A MEMBER OF, OR PARTICIPATE IN, AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING? ☐ YES ☐ NO (If Yes, give Name and Address of association or group)

12. DID FIRM PERFORM NATIONAL DEFENSE WORK DURING THE PERIOD INDICATED IN 10 ABOVE? ☐ YES ☐ NO (If Yes, amount of dollar volume and name(s) and address(es) for whom work was performed)	$

13. PROVIDE NAME AND TITLE OF YOUR REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION CONCERNING THE OPERATION OF YOUR BUSINESS

NAME	TITLE	TELEPHONE NO.

SIGNATURE OF AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)	SIGNATURE	DATE

11708.2 *Sworn Affidavits; When Required:* Where an employer furnishes commerce information that falls just short of the jurisdictional standards used by the Board and where the employer contests the Board's jurisdiction on the ground that its business does not meet the Board's standards, sworn affidavits should be procured from the employer with respect to the information being furnished. The Regional Director may request an affidavit in any case, should he believe that the circumstances justify one.

In the obtaining of an affidavit pursuant to the foregoing policy, the employer should be advised that it is subject to the criminal penalties of the United States Code applicable to any one giving false information to the United States Government, and a statement to this effect, such as that now used on petitions and charges,

> WILLFULLY FALSE STATEMENTS HEREIN CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

could appropriately appear at the bottom of the affidavit.

If, on request made pursuant to the foregoing policy, the employer refuses to submit an affidavit, the case should be set down for hearing, all other factors being appropriate.

11708.3 *Subpoena Served on Employer (see also secs. 11770-11806):* All reasonable and practical avenues are to be explored before resort to investigative subpoena. Should an employer prove uncooperative in this respect, other sources (sec. 11710) should be utilized unless an undue expenditure of time will be involved. One need not, for example, circularize 30 or 40 customers of an employer as an alternative to issuance of a subpoena on the employer.

If the utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction in C case, a subpoena—normally, duces tecum—should be served on the employer. It should be returnable *before* issuance of complaint unless it is otherwise clear (through some form of inadmissible evidence, such as widespread repute, etc.) that the Board does have jurisdiction. In the latter case, the subpoena should be returnable at the C case hearing.

If, in representation cases, utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction, production of the relevant material should be demanded in writing (subpoena returnable at the hearing may be used for this purpose). The Board agent responsible for establishing jurisdictional facts should be prepared to establish facts concerning statutory jurisdiction and otherwise make a record appropriate for a jurisdictional determination under the *Tropicana Products*, 122 NLRB 121 (1958), standard, in the event of noncooperation or noncompliance with the subpoena. If, for any reason, the *Tropicana* standard is inapplicable, uncertain, or inadvisable, a subpoena duces tecum should be served, and, if necessary, enforced. In appropriate circumstances, a subpoena returnable before issuance of the notice of hearing may be used.

11710 *Other Sources for Obtaining Commerce Information:* Other sources may be utilized as a supplement to, a check on, or substitutes for information supplied directly by the employer. For example:

a. Prior cases

b. Employees, such as receiving/shipping department employees

c. Suppliers or customers of employer

d. Railroads, trucking lines

e. State and Federal agencies

f. Business listings, Moody, Standard and Poor, trade journals.

11710.1 *Contacts with Other Agencies:* Contacts with Washington offices of other agencies should be made through the Division of Operations Management. Out-of-Washington contacts may be made directly or with the assistance of other Regional Offices.

11712 *Action on Basis of Commerce Investigation:* Do not proceed (or dismiss) on a bare admission (or denial) that jurisdiction exists. All determinations in this respect must be based on *facts*.

11712.1 *Jurisdictional Standards Not Met:* Where it is clear that a given case does not meet the Board's jurisdictional standards, the case should be dismissed on the ground that it will not effectuate the policies of the Act to assert jurisdiction.

11712.2 *Jurisdiction Doubtful:* Wherever a case involves a doubtful question of jurisdiction, submit it for advice to the Division of Advice (see sec. 11751.1), whether or not any party objects to the assertion of jurisdiction.

11712.3 *Gross Volume Sole Test:* Where gross volume of business is the sole test for asserting jurisdiction, elicit commerce data on inflow, outflow, franchise, etc., sufficient to establish *de minimis* statutory jurisdiction.

11712.4 *Subpoena Not Complied with:* Where an investigative subpoena relating to commerce has not been complied with, it should be enforced (secs. 11770 and 11790) unless *Tropicana* is relied on or the need for the subpoenaed material is otherwise obviated (sec. 11708.3).

11714 *Proof in Formal Proceedings:* See sections 10390–10402 for C cases; sections 11216–11230, particularly 11228, for R cases. Also see section 11712.4. In absence of stipulation thereto, commerce facts should be proved on the record.

11720–11720.4 *Transfer, Consolidation, and Severance*

11720 *Generally:* Rules and Regulations, Sections 102.33 and 102.72, deal with transfer, consolidation, and severance of charges and petitions, respectively. The bases for action in this respect involve necessity with respect to effectuation of purposes of the Act, costs, and time, e.g., cases may be transferred where economy is thus achieved; cases may be consolidated where (a) the issues and parties are substantially the same and (b) no one is prejudiced thereby.

11720.1 *Transfers:* Transfers are handled in the following manner: The Regions involved in the transfer will confer by mail, teletype, or telephone about the proposed action and the reasons therefor. The Region that is transferring the case will then request the Division of Operations Management by teletype (see Clerical Procedures, sec. 12420) for an order transferring the case. The request will contain the case name, petitioner or charging party, the present case number, and number to be assigned on transfer; a brief statement of the reasons for transfer; and an indication of whether the transferee Region concurs in the proposed action. A copy of the teletype will be sent to the transferee Region. On receipt of the General Counsel's order of transfer, the transferring Region will send the file to the transferee Region after notifying all parties to the case of the transfer and that future correspondence in the case should be directed to that office.

A transfer may be effected at the time of filing, if the necessity for transfer is apparent at that time; otherwise, the transfer should take place as soon as the necessity therefor becomes apparent.

11720.2 *Consolidation:* A consolidation normally does not take place while the cases involved are in the nonformal investigative stages. It normally occurs when notices of hearing are about to issue or when, one of the cases already having been noticed for hearing, the other(s) are about to be noticed.

A Regional Director on his/her own motion may, without clearance, consolidate cases pending in his Region in the following situations:

a. R cases involving the same employer or the same employer-association

b. CA cases where the respondent is the same in each case

c. CB cases where the respondent is the same and where the fact situations are related (e.g., an illegal contract or an association-wide strike)

d. A CA and a CB case where both cases arose from the same state of facts (e.g., a discharge, a strike situation, or bargaining negotiations claimed to have been in bad faith on both sides)

e. An R case in which the Board or the Regional Director has directed a hearing on objections with a C case, where the two cases involve issues in common.

In all other situations where consolidation is desired, an oral or written request for authority, including a brief statement of facts, should be submitted to the Division of Operations Management.

The order of consolidation is issued by the Regional Director where the cases consolidated are all pending in his/her Region and may be combined with a notice of hearing.

11720.3 *Severance:* Prior to hearing the Regional Director, on his/her own motion, may sever cases that he/she had previously consolidated on his/her own authority. In other situations clearance should be obtained from the Division of Operations Management.

11720.4 *Motions:* Motions by the parties to consolidate or sever should be filed with the chief administrative law judge if prior to hearing or with the administrative law judge if during hearing.

11730–11730.11 *Concurrent R and C Cases*

11730 *Concurrent R and C Cases:* The Agency has a general policy of holding in abeyance any representation case (RM, RC, or RD) or union deauthorization case (UD) where pending unfair labor practice charges filed by a party to the R or UD cases are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition (e.g., *United States Coal & Coke Co.*, 3 NLRB 398, 399 (1937); *Carson Pirie Scott & Co.*, 69 NLRB 935, 938–939 (1946); *Columbia Pictures Corp.*, 81 NLRB 1313, 1314 (1949); see also *Holt Bros.*, 146 NLRB 383, 384 (1964)).

Where the pending charges allege violations of Section 8(a)(2), 8(a)(5), 8(b)(3), or 8(b)(7), such a policy also applies even where the person filing the charges is not a party to the R or UD case, and the petition may ultimately be dismissed, since the nature of the alleged violations of those sections of the Act and the remedies that could be provided therefor, might condition or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries*, 201 NLRB 197 (1973)).

Exceptions to the application of these general policies include:

a. Situations where the person filing the ULP charge has requested the agency to proceed with the election (see sec. 11730.4)

b. Situations where, in the absence of a request to proceed, the Regional Director is of the opinion that the employees could, under the circumstances, exercise their free choice in an election and that the R case should proceed (see sec. 11730.5)

c. Situations where the alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the R case will resolve significant common issues (see sec. 11730.6)

d. Situations where charges are filed too late to permit investigation or clearance before a scheduled election (see sec. 11730.7).

A ULP charge is "pending" at all stages up to and including a withdrawal or dismissal, on the one hand; or, on the other, up to and including a court judgment with which there has not been full compliance.

(See sec. 10247 for special procedures where there are concurrent 8(b)(7) and (4) cases.)

[Insofar as applicable, reference in this section to R cases shall include AC, UC, and UD cases.]

11730.1 *Priority of Investigation:* If the charge is already pending at the time of the filing of the petition the investigation of the petition will normally be postponed; if the charge is filed after investigation of the R case has already begun, action on the petition will normally be suspended pending investigation of the charge, except where dismissal of the petition is warranted or the petitioner had requested its withdrawal.

As noted, processing of the R case will normally be suspended pending completion of the C case investigation. The Regional Director has discretion, however, to proceed with the R case in situations where the hearing has been scheduled and time does not permit determination of possible merit of the charge. Such discretion permits processing the R case up to but not including a decision, except on clearance with the Board. In addition, circumstances may warrant scheduling a hearing at a date when it is anticipated investigation of the C case will have progressed to the point where a determination may be made as to possible merit.

The investigation of ULP charges that are delaying disposition of an R case shall be accorded priority as established by section 11740.2(c).

11730.2 *Where C Case is Found Not to Have Merit:* If, on completion of investigation of the ULP charges, it is determined that the charges lack merit and are to be dismissed, absent withdrawal, the Regional Director should proceed with the processing of the R case. Even though the dismissal of the ULP charges is appealed, the Regional Director should proceed as if there were no concurrent charge, unless, in his/her discretion, he/she believes that further processing of the R case should await the results of the appeal.

However, where the situation involves an 8(a)(2), 8(a)(5), 8(b)(3), or 8(b)(7) charge (or an 8(a)(1) charge alleging employer assistance in filing a concurrent RD petition), which was dismissed and is either pending or on appeal, clearance should be obtained from the Board through the Office of the Executive Secretary before proceeding to an election.

When an appeal is filed the Office of Appeals should be promptly notified of the pending concurrent R case by special teletype.

11730.3 *Where C Case is Found to Have Merit:* If, on completion of investigation of the ULP charges, it is determined that the charges have merit and that a complaint should issue, absent settlement, the Regional Director should determine whether the further processing of the R case should be blocked by the C case. For the purposes of that determination, the Regional Director shall accept the ULP allegations, which are or would be set forth in the complaint, as true. If the Regional Director determines that the R case should be blocked by the C case because of the impact of the unfair labor practices on an election, were one to be conducted, he/she should hold the R case in abeyance until disposition of the C case, whereupon the processing of the R case may be resumed. Where the meritorious ULP allegations involve violations of Section 8(a)(5) or 8(b)(3), or a violation of Section 8(a)(2) where the alleged 8(a)(2) union is the petitioner in the R case, and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, the R case should promptly be dismissed, subject to reinstatement by the petitioner on final disposition of the C case. (Exceptions to the foregoing are set forth in secs. 11730.4-11730.7) The provisions of section 11730.11 should be followed by the Regional Director in informing the parties of his/her decision to hold in abeyance or to dismiss. Such action by the Regional Director is subject to appeal to the Board by any party under the provisions of Section 102.71 of the Board's Rules.

11730.4 *Exception 1—Request to Proceed Notwithstanding Pending Charges:*

a. An R case may be processed notwithstanding the pendency of ULP charges in a related C case (subject to the limitations set forth below), if the party filing the charge requests that the R case proceed. The request to proceed must be in writing. Form NLRB-4551 may be used for this purpose.

On receipt of a request to proceed, the Region may proceed with appropriate regional action on the R case (i.e., conduct the informal investigation; issue notice of, or conduct, a hearing; proceed with an election; or notify Executive Secretary if the matter is before the Board (sec. 11730.9)).

b. Where the nature of the alleged violations of Section 8(a)(2), 8(a)(5), or 8(b)(3) if proven would condition or preclude the existence of a question concerning representation, a request to proceed should not be honored where the blocking charge alleges such violations, except on specific authorization (see sec. 11730.10). Where such charges are involved they will, absent such specific authorization, be disposed of before concurrent R cases are processed.

c. Regional Directors are authorized after clearance with the Board through the Office of the Executive Secretary to honor a waiver whereby the petitioner affirmatively indicates a willingness to withdraw an 8(a)(2) assistance charge in the event the allegedly assisted union is certified. (*Carlson Furniture Industries*, 157 NLRB 851 (1966).) This authorization is limited to cases in which the Board has entered an order requiring the respondent employer to withdraw and withhold recognition from the assisted union unless and until it has been certified. Other concurrent R and C situations involving 8(a)(2) conduct are to be submitted according to sections 11730.7 and 11730.9.

d. In this respect, a party who requests withdrawal of a refusal-to-bargain charge, or of a domination of or assistance to union charge, to unblock an R case (in other words, who attempts to accomplish by withdrawal what he/she cannot accomplish by request to proceed) should be advised that, except in circumstances where the *Bernel Foam* principle (*Bernel Foam Products Co.*, 146 NLRB 1277 (1964)) is applicable, reinstatement of the charge might not be permitted after an election. *Fernandes Supermarkets*, 203 NLRB 568 (1973).

11730.5 *Exception 2—Where Fair Election Can Be Conducted Notwithstanding Meritorious Charges:* Notwithstanding the existence of a concurrent C case and the absence of a request to proceed (sec. 11730.4(a)) or a waiver (sec. 11730.4(c)), the Regional Director may be of the opinion that the employees could, under the circumstances, exercise their free choice in an election and that the R case should proceed. In such cases, the Regional Director should seek advice from the Board through the Office of the Executive Secretary (copy to the Division of Operations Management), giving supporting reasons. Among the factors to be considered are the character and scope of the charge and its tendency to impair the employees' free choice; the size of the working force and the number of employees involved in the events on which the charge is based; the entitlement and interest of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; the showing of interest, if any, presented in the R case by the charging party; and the timing of the charge. The Board through the Office of the Executive Secretary will render appropriate advice.

11730.6 *Exception 3—Where Significant Common Issues Will Be Resolved by Processing the R Case:* Notwithstanding the absence of a request to proceed (sec. 11730.4(a)) or a waiver (sec. 11730.4(c)), the Regional Director may be of the view that the R case should proceed where (a) the unfair labor practices are so related, at least in part, to the unresolved issues sought to be raised by the petition that the processing of the R case will resolve significant common issues (e.g., *Panda Terminals*, 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis*, 121 NLRB 601, 615–616 (1958)), and (b) the conditions of exemption 2 (sec. 11730.5) are met. In that event, the Regional Director should seek advice from the Board through the Office of the Executive Secretary (copy to the Division of Operations Management), giving supporting reasons.

11730.7 *Exception 4—Charge Filed Too Late to Permit Investigation:* Where charges are filed too late to permit adequate investigation or clearance before a scheduled election, the Regional Director may, in his/her discretion:

a. Postpone the election pending disposition of the charges or clearance for proceeding

b. Hold the election as scheduled and impound the ballots until after disposition of the charges

c. Conduct the election, issue tally of ballots, and, in the absence of the filing of objections, issue certification; and then proceed to investigate the charges.

11730.8 *Resumption of Processing of R Case on Disposition of ULP Charge:* Processing of an R case held in abeyance during the pendency of a ULP charge may be resumed on the disposition of the blocking charge. Where the charged party or respondent in the ULP proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board order, or court judgment, except that the full period for posting any required notice has not passed, certain action with respect to the R case may be taken, whether or not the charging party requests that the R case proceed.

a. A hearing may be held

b. A consent-election agreement may be taken

c. A decision and direction of election (or order dismissing petition) may be issued.

However, except in exceptional circumstances, no *election* should be held until the posting period has expired. In the event the charging party wishes to proceed to an election during the posting period, a written waiver must be obtained from the charging party agreeing that the unremedied unfair labor practices referred to in the posted notice may not constitute grounds on which the Board may set aside the election.

As an exception to the foregoing instructions, when the remedy requires that recognition of an unlawfully assisted union be withdrawn and withheld unless and until that union has been certified by the Board, neither an RC petition filed by that union, nor an RM petition, should be entertained until after the expiration of the posting period, and the showing of interest submitted in support of a petition filed by that union must be dated after expiration of the posting period.

11730.9 *Notification to Board:* If a blocking charge is filed at a time when the R case is with the Board in Washington, the Board should be notified of the filing. Form NLRB-511, the blank spaces of which are self-explanatory, should be sent directly to the Executive

Secretary's Office. All subsequent relevant developments or dispositions of the C case should be reported to the Executive Secretary's Office. On receipt of an executed request to proceed in the R case the Executive Secretary's Office should be notified.

11730.10 *Withdrawal of Request to Proceed:* Should a party attempt to withdraw a request to proceed, and once again suspend action on the R case, the reasons for the change of attitude should be ascertained. The Regional Director should rule on the request for withdrawal or, if the Regional Director wishes, may seek advice from the Executive Secretary's Office.

In 8(a)(2), 8(a)(5), or 8(b)(3) situations, where the nature of the allegations alleged, if proven, would condition or preclude the existence of a question concerning representation, requests to proceed will not normally be honored except on specific authorization by the Board through the Office of the Executive Secretary.

11730.11 *Informing Parties of Regional Director's Action:* Where, after deciding a complaint on concurrent ULP charges should issue, the Regional Director concludes that the concurrent R petition should be held in abeyance pursuant to the provisions of section 11730.3, the Regional Director should informally notify the parties of that decision and give them the reasons for not proceeding on the representation petition at that time.

If any party wants the reasons in writing, the Regional Director will set them forth in a letter informing the parties of the basis for the decision to hold the representation case in abeyance pending disposition of the unfair labor practice charges. The letter should also inform the parties of their right to appeal this action to the Board under Rule 102.71.

Where the Regional Director dismisses the petition because of pending meritorious 8(a)(2), 8(a)(5), or 8(b)(3) charges, the dismissal letter should set forth the reasons for the action, including the reasons why the unfair labor practice findings of the Regional Director would affect further processing of the petition, and inform the parties of the right to obtain review (under Sec. 102.71 of the Rules) by filing a request with the Board in Washington. The letter should also advise the petitioner that the R case dismissed is subject to reinstatement, if appropriate, on the petitioner's application after disposition of the ULP proceeding. To assure notification to the petitioner of the disposition of the ULP proceeding, the petitioner should be considered a party in interest in the ULP proceeding with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding.

PRIORITY OF CASES

11740–11740.2 *Priority of Cases*

11740 *Priority of Cases:* All cases are handled promptly but preference is given to those cases that have priority under the statute.

11740.1 *Statutory Priority Cases:* (See Sec. 10(l) and (m) of the Act.) The following types of cases have statutory priority:

a. 8(b)(4)(A), (B), and (C) cases

b. 8(b)(4)(D) cases involving 10(l) injunctive relief

c. 8(b)(7) cases, including petitions under Section 8(b)(7)(C) and Section 9(c), and charges affecting the disposition of 8(b)(7) cases or petitions thereunder

d. 8(e) cases

e. 8(a)(3)

f. 8(b)(2)

In determining which of several statutory priority cases should be given priority within the particular class or category, consideration shall be given to the particular facts of each case, including the date of filing, the nature of the alleged violation, its impact on the parties or the public, the type of relief indicated, and any other factors that would effectuate the policies of the Act in relation to priority in casehandling.

In this connection, where the need for injunctive relief is indicated in a particular statutory priority case, the preliminary investigation of such case, including the further processing to injunctive relief, shall normally take precedence over other matters in the office since time is of the essence where such relief is indicated. While all statutory priority cases must be handled expeditiously, any determination as to the manner of implementing this objective must in part be predicated on recognition of the time-factor problems relating to each. For instance, in an "expedited" election situation under Section 8(b)(7)(C), an interval of several days would normally be involved between the time of the direction of the election and the holding of the same during which the priority nature of the case would be of little practical significance; similar considerations are involved when evidence in an 8(a)(3) or 8(b)(2) case is unavailable for a short period of time, etc.

11740.2 *Order of Priority Based on Agency Policy:* Those cases not referred to in section 11740.1 as having statutory priority should be handled in accordance with the following order of priority which is based on agency policy considerations:

a. Any other C case involving 10(j) injunctive relief (the priority status of cases involving 10(j) injunctive relief is determined when the need for such injunctive relief is first indicated)

b. Other 8(b)(4)(D) cases

c. Other charges that are delaying the disposition of an R case (e.g., "blocking" C case)

d. Cases in which a work stoppage or lockout is in effect or is imminent and there is a direct relationship between the stoppage or lockout and the charge or petition

e. R cases involving a schism issue

f. Other R or UD cases

g. Other C cases

No action should be suspended in *any* case except for action on a case of higher priority. Thus, the possibility of settlement should not be allowed to impede the orderly processing of a case.

Where in an 8(b)(4)(D) case 10(l) injunctive relief is indicated, it is treated as a statutory priority case. Where such injunctive relief is not indicated, the priority of an 8(b)(4)(D) case is no longer considered statutory in nature; such cases are accordingly given priority in the manner described above within the Agency policy category.

Where petitions under Sections 8(b)(7) and 9(c) of the Act are "blocked" by a C case, the latter should be investigated promptly and given priority over all other cases except as listed in section 11740.1, since the disposition of the "blocking" charge affects the further processing of the petition and the statutory priority 8(b)(7) case. Similarly, an 8(a)(2) charge filed in the context of an 8(b)(7) case would require a prior determination since no 10(l) restraining order in the 8(b)(7) case could be sought if it is determined that the 8(a)(2) case has merit. (See Sec. 10(l) of the Act.)

11750–11756 *Submission for Advice, Clearance, or Authorization*

It is not intended that sections 11750–11756 take the place of instructions in other sections of the manual concerning advice, clearance, or authorization, all of which should be followed even though not specifically set forth.

11750 *In General:* The decision as to whether a case falls in category of cases covered by this section must be made by, and is the responsibility of, the Regional Director. Although disagreement on the merits between the Regional Director and regional attorney does not automatically render a case one to be submitted, the existence of such disagreement is an important factor to be considered. Where the Regional Director and the regional attorney are in agreement that the case need not be submitted, dissent of other regional personnel need not be considered.

All questions in a case should be submitted simultaneously and should be clearly posed. Normally, the entire file should be sent in. It is not required that the parties be notified that the case is to be submitted to the Division of Advice. However, the file should indicate the positions of the parties with respect to the advice issues. Where the parties have not had the opportunity to submit their positions, they should be notified and invited to submit their positions promptly. As the statements of positions must be promptly submitted, the Region will not be significantly delayed in the preparation of its advice submission.

Credibility issues should not be submitted for resolution. If differences of opinion on credibility exist in the Region, they should be noted in the file; but the Regional Director must make the regional determination (sec. 10060).

All cases remanded to the Regions by the Division of Advice are to receive priority treatment and such further investigation as may be required shall be conducted immediately. The Region should return all remanded cases to Washington within 7 days after receipt, unless the nature or extent of the further investigation required or the unavailability of essential witnesses prevents prompt resubmission. Where the information requested can be transmitted conveniently by telephone or teletype, this means of communication should be utilized. In the event the further investigation cannot be completed and the case will not be resubmitted within a 7-day period, the Division of Advice should be notified of the reason for the delay and given an estimate of the additional time required.

11750.1 *Special and Miscellaneous Litigation; Collateral Suits in Federal or State Courts:* Whenever the Board or its agent may be sued or whenever a request is made that the Board intervene in private litigation, telephone the information to the Assistant General Counsel, Special Litigation. (See also secs. 10024.2, 11005, 11300.1.) Pleadings and papers, as received, should be forwarded by the quickest means to:

Office of the General Counsel

Attention: Assistant General Counsel, Special Litigation, Appellate Court Branch, Division of Enforcement Litigation

(Regions should also apprise their Assistant General Counsels in Division of Operations Management of these actions.)

In suits where injunctive relief is sought, call the Assistant General Counsel, Special Litigation, as soon as possible, and send all relevant papers via special delivery.

11751 *C Cases*

11751.1 *Generally.* Regional Directors are authorized to approve *unsolicited* withdrawals in all cases that would otherwise be submitted for advice, except where complaint has already been authorized by the Division of Advice. As to the approval of settlement agreements in advice-type cases, see section 11751.2. In all other proposed dispositions (i.e., complaint, dismissal, solicited withdrawals, or unsolicited withdrawals after complaint has been authorized by Advice), the Regional Director should submit to the Division of Advice any case falling within the classifications set forth in the current General Counsel memorandum dealing with this matter. The specific categories of cases to be submitted to Division of Advice are not set forth in this manual as they are revised on May 1 and November 1 of each year by issuance of a General Counsel memorandum. See for example G.C. Memo 86-11. General Counsel memoranda are available to the public.

The classification system used in the General Counsel's memoranda is as follows: The letters "MS" mean mandatory submission for all cases arising in the area. The letters "DS" refer to subject matter areas that *may very well* involve novel, complex, or doubtful issues, or policy issues. In these "DS" areas, the Regional Director should fully consider whether the case involves such issues, and the Region should be especially careful in its research. If there is a relevant guideline memorandum, it should be reviewed, together with postmemorandum decisions. However, the final decision as to whether to submit a case in one of the "DS" areas is that of the Regional Director. Finally, the letter "X" indicates subject matter areas that would not be specifically listed any longer. It is, of course, understood that cases in areas that are not listed may nonetheless involve novel, complex, or doubtful issues, or policy issues. If the Regional Director finds this to be the case, the matter should be submitted to Advice. As to matters that are interregional or national in scope or importance, the Regions should consult with Division of Operations Management to insure uniform handling and Washington awareness of the cases. If Division of Operations Management believes that the issues require Advice consideration, it can direct that the case(s) be sent to Advice.

> Section 10(j) requests should be submitted to Division of Advice except where the regional director would dismiss the charge on the merits, or where clearance is obtained from the Division of Operations Management to deny the 10(j) request (see sec. 10310.1).

NOTE: In all cases pending on advice, and in order to avoid unnecessary work by the Division of Advice, any subsequent developments (such as withdrawals, settlements, private adjustments) should be reported to the division promptly. This is especially important in cases involving injunctive relief.

11751.2 *Settlement Agreement:* The Regional Director should submit to the Division of Operations Management any settlement agreement, before approval, which he/she finds to involve the following:

a. Remedial aspect of a settlement is based on new or novel concepts.

b. Cases where the notice posting is waived or is for less than 60 days (sec. 10132.1).

11751.3 *Special Matters to Be Submitted to the Division of Operations Management Prior to Issuance of Complaint:*

a. Cases where investigation of charge indicates that the conduct complained of may also constitute noncompliance with a pending administrative law judge's decision, Board order, or court judgment in a prior case.

b. Before naming an attorney as a party respondent and/or agent of the respondent in the commission of unfair labor practices.

c. In cases in which the alleged unfair labor practices also violate the Occupational Safety and Health Act administered by the U.S. Department of Labor, the Region should refer to G.C. Memos 75-29 and 79-4 for instructions regarding submission of items to Division of Operations Management.

d. In cases in which the alleged unfair labor practices also are violative of the Federal Mine Safety and Health Act of 1977 administered by the U.S. Department of Labor, the Region should refer to G.C. Memo 80-10 for instructions regarding items to be submitted to Division of Operations Management.

11751.4 *Prehearing and Hearing:* Clearance from the Division of Operations Management should be obtained before:

a. Issuing investigative subpoenas in certain situations (secs. 10252 and 11770)

b. Issuing trial or hearing subpoenas if there are new or doubtful legal problems of enforceability (secs. 11772 and 11790)

c. Consolidation of cases in situations other than those set forth at section 11720.2

d. Severance of consolidated cases except as permitted by section 11720.3

e. Seeking enforcement of subpoena where between decision to issue and necessity of enforcement, intervening circumstances create enforcement problems (sec. 11790)

f. Denying request of private party for enforcement of subpoena (sec. 11790.1)

g. Introducing in evidence matters of a confidential nature (sec. 10398)

h. Travel by a trial attorney to appear at the taking of a deposition outside his own Region, where this appears necessary (sec. 10352.5).

11751.5 *Posthearing:* Washington clearance should be sought in the following matters from the Washington division or branch indicated in each subsection:

a. If the administrative law judge's decision embodies novel or complex policy questions (sec. 10430.1) (Division of Operations Management)

b. Normally responsibility for determining whether exceptions to an administrative law judge's decision should be filed rests with the Region. Exception: where complaint was authorized by any division or branch in Washington the Region should make a recommendation to that branch or division as to filing of exceptions. (This should be done promptly so that a decision can be made within the time for exceptions to be filed.) Where the theory of a desired exception is other than that on which the case was originally tried or where a new and novel issue is involved, clearance should be obtained from the Division of Operations Management (sec. 10438.3).

c. Before requesting oral argument before the Board (sec. 10438.5) (Division of Operations Management)

d. Before filing a motion for reconsideration of a Board order (sec. 10452) (Division of Operations Management)

e. Before filing an opposition to other party's motion for reconsideration where new or novel legal problems are involved (sec. 10452) (Division of Operations Management).

11751.6 *Compliance:* Compliance with settlement agreement, administrative law judge's decision, Board order, or court judgment should be cleared with the Division of Operations Management in the following situations:

a. If proposed compliance does not include posting of notice to employees (secs. 10132.1 and 11751.4)

b. In new or novel situations (sec. 10520)

c. Before accepting cash settlements in lieu of reinstatement (sec. 10528.5)

d. Before permitting cross-examination of discriminatees concerning their interim earnings and search for work as a prerequisite to settlement (sec. 10634)

e. Before issuing complaint on new charge where noncompliance in prior case may be involved

f. In cases posing unusual or close issues relating to the posting of side notices by respondents.

11751.7 *Backpay:* Clearance should be sought from the Division of Operations Management:

a. Before institution of formal proceedings absent a court judgment or stipulation waiving enforcement (sec. 10652.1)

b. Before acceptance of compliance with an administrative law judge's decision, Board order, or court judgment, on other than an equal proportionate basis (secs. 10636.1 and 11751.2)

c. Before accepting an offer of lump sum settlement that is less than amount found due and does not comply with standards set forth in section 10628.1 (see also sec. 10629)

d. Before agreeing to cash settlement in lieu of reinstatement (sec. 10528.5)

e. Before backpay is obtained from the respondent or disbursed if standards are not complied with (except in informal settlements prior to hearing) (secs. 10570–10571)

f. Before including backpay matters in ULP hearing (sec. 10650)

g. Before issuing notice of hearing without backpay specification (sec. 10654.2)

h. Before testimony of compliance officer regarding backpay computation (sec. 10716.1)

i. Before extended delay in service of backpay specification (after court judgment) (sec. 10574.1)

j. Before withdrawal of specification where settlement reached does not meet all of the criteria set forth in section 10571 (sec. 10674.1).

11752 *10(k) Situations:* For the handling of 10(k) situations generally see sections 10208–10214 and G.C. Memo 73–82, and any modifications thereto that may subsequently issue. Note particularly clearance from the Division of Operations Management should be obtained in the following:

a. Before scheduling hearing for less than 11 days after service of notice of hearing (sec. 10210.2b, c)

b. Before designating a case as involving national defense if other than a missile or space site case (sec. 10210.3).

11754 *R Cases*

11754.1 *General:* All requests for advice in representation cases except as set forth in section 11754.2 should be directed to the Board through the Office of the Executive Secretary. The request for advice may be submitted either in writing, or where expedition is essential, by telephone or telegram.

Normally, requests for advice with respect to substantive law will not be submitted to the Board as the Regional Director is expected, in his/her decisionmaking capacity, to apply Board precedent and to decide most questions of statutory interpretation in light thereof. In unusual cases presenting novel issues, of course, the Regional Director may, in the exercise of his/her discretion, transfer such matters to the Board for decision. Advice, clearance, or authorization should be sought from or notification given to the Board or the Office of the Executive Secretary in the following circumstances:

a. Prior to any relaxation of the rule requiring a 30-percent showing of interest by petitioner (sec. 11022.3)

b. If suspected fraudulent authorization cards are submitted (sec. 11028.2b and 11028.4)

c. Where no-raiding procedures are involved (secs. 11052.1a, c, f and 11056)

d. If a case is in Washington on a request for review of the Regional Director's administrative dismissal and he wishes to revoke such dismissal (sec. 11100.3)

e. Where the union does not have a petitioner's showing of interest and the employer wishes to withdraw its RM petition over union opposition (sec. 11114.2)

f. Where a petitioner wishes to withdraw a petition after a valid election (sec. 11116)

g. Where the validity of the showing of interest has been raised in a request for review (sec. 11274)

h. Before treating exceptions or a request for review as a motion for reconsideration (secs. 11274 and 11406)

i. Where the date of an election has been set and a request for review is filed with the Board (secs. 11274, 11302.1, and 11314)

j. Where the date of an election has been set and a motion for reconsideration has been or is to be filed with the Board (sec. 11282)

k. Where an extension of the 30-day period to conduct a Board-directed election is necessary (sec. 11284)

l. Where the employer refuses to furnish an *Excelsior* list in an RM case (sec. 11312.6c)

m. Before updating the eligibility list used in a runoff (sec. 11250.5)

n. Where *Lufkin* rule language is included in election notice and problems or difficulties are encountered (sec. 11452.1)

o. Before proceeding to an election when dismissal of 8(a)(2), 8(a)(5), 8(b)(3), or 8(b)(7) charge (or an 8(a)(1) charge alleging employer assistance in filing a concurrent RD petition) is pending on appeal (sec. 11730.2)

p. Where a *Carlson Furniture* waiver is involved (sec. 11730.4c)

q. Where the Regional Director believes a fair election is possible notwithstanding a meritorious unfair labor practice charge (sec. 11730.5)

r. Where significant issues common to C and R cases might be resolved by processing the R case (sec. 11730.6)

s. Before honoring a request to proceed in the face of concurrent 8(a)(2), 8(a)(5), or 8(b)(3) charges (sec. 11730.10).

11754.2 *Advice, Clearance, or Authorization from the Division of Operations Management Should Be Sought Before:*

a. It is not required to submit for clearance before referring to other Federal or state agencies possible violations of other statutes, except the requirement of clearance would continue when the potential violation concerns possible criminal conduct related to Board proceedings, e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings. Similarly, the clearance requirement would continue prior to referral if alleged unethical conduct of attorneys is involved. (See sec. 10054.3.)

b. Issuing investigative subpoenas in certain situations (secs. 10252 and 11770)

c. Issuing hearing subpoenas if there are new or doubtful legal problems of enforceability (sec. 11772)

d. Consolidation of cases in situations other than those set forth at section 11720.2

e. Severance of consolidated cases except as permitted in section 11720.3

f. Payment of special fee for expert testimony (sec. 11780)

g. Seeking enforcement of subpoena where, between decision to issue and necessity of enforcement, intervening circumstances create enforcement problems

h. Denying request of private party for enforcement of subpoena (sec. 11790.1)

i. Taking actions pursuant to Section 102.66(d)(2) of the Rules concerning misconduct by parties during R case hearing (sec. 11182.1)

j. Filing a motion for reconsideration of a Board decision or an answer to such a motion filed by any other party that raises new or novel legal problems (sec. 10452 and 11751.5(e))

k. Preparing and conducting last-offer elections (sec. 11520)

l. Accepting offer of parties to share expenses of an election (sec. 11302.2)

m. Notifying voters of an election by newspapers, radio, or television (sec. 11314.3)

n. Obtaining non-Board personnel to participate in the conduct of an election

o. Requesting an administrative law judge to handle a complex hearing on objections/challenges (sec. 11424.1)

p. Filing a brief by counsel for the Regional Office in a hearing on objections/challenges (sec. 11430)

q. Filing exceptions with the Board to hearing officer's report on objections/challenges (sec. 11434).

11756 *Format and Content of "Request for Advice":* Submit an original and seven copies of transmittal memo, mark one copy "Division of Operations Management." Caption the memo "Request for Advice" and arrange under the following headings:

a. Charge

b. Issues (note clearly the specific issues on which advice is sought)

c. Facts (set forth concise statement of relevant facts including the resolution of credibility)

d. Region's position (spell out Region's position respecting each issue, indicating any differences among the regional personnel involved)

e. Analysis (each position—under d above—should be supported in the analysis and pertinent facts set forth. Analysis should be only as comprehensive as regional time permits)

f. Related cases, if any (note current status of all related cases).

11770–11828 *Subpoenas*

Section 11(1) of the Act provides that the Board, or any Member, may issue subpoenas calling for attendance and testimony of witnesses or the production of evidence in any investigation or proceeding.

NOTE: Effective December 14, 1970, Section 11(3) of the Act was repealed by P.L. 91–452, which substituted therefor provisions on immunity of witnesses under Title 18, U.S.C. including subsections 6002 and 6004. See also Rules and Regulations 102.31(c) effective 12–14–70. Therefore, whenever a witness in a Board proceeding claims privilege, it is necessary for the Agency to obtain the Attorney General's approval before compelling the witness to testify or provide other information. Requests for such authorization and the reasons in support thereof should be addressed to the Division of Operations Management.

11770 *Investigative Subpoenas:* During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

(Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue complaint unless Division of Operations Management clearance has been procured.)

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

11770.1 *Application for Investigative Subpoena:* The investigative subpoena should be requested of the Regional Director by the attorney assigned to the case. (If no attorney assignment has been made up to this point, it should now be made.) The application, in writing, should contain a statement of the scope of the information or documents sought and of their relevance.

11770.2 *Issuance by Regional Director:* The Regional Director, *where there are no foreseeable problems of enforceability*, has authority to issue an investigative subpoena without clearance by the Division of Operations Management:

a. Where a potential witness or custodian of needed records is willing to testify or to produce the records only if subpoenaed;

b. Where the object of the desired subpoena is the ascertainment of "commerce" data; the party to be called is a party to the case or the records required are those of a party to the case; *and* there is reasonable cause to believe that the Board would assert jurisdiction;

c. Where the object of the desired subpoena is the procurement of an eligibility list for an impending election; or

d. Where the object of the desired subpoena is the procurement of a payroll list of unit employees to determine the majority status of a union in a C case (sec. 10058.4).

Clearance by the Division of Operations Management should be sought in all other situations. Requests for clearance should contain a copy of the memorandum accompanying the application, any other information deemed relevant, and the Region's recommendations.

Investigative subpoenas, when issued, should be returnable at a time certain before the Regional Director, where this is at all practicable.

11770.3 *Reports to the Division of Operations Management:* When problems of enforceability arise following clearance by the Division of Operations Management to issue investigative subpoenas, the Regional Director should report developments on the matter thereafter to the Division of Operations Management.

11772 *Trial or Hearing Subpoenas:* The need for subpoenas calling for testimony or the production of records at a C or R hearing is a matter initially to be determined by the attorney or other Board agent involved, in consultation with his/her supervisor.

In addition to the necessity for the subpoena, however, counsel must take into consideration the potential enforcement of the subpoena. The subpoena should not be requested if it appears that it cannot be enforced in the event of noncompliance. Furthermore, if there are new or doubtful legal problems of enforceability, the matter should be submitted to the Division of Operations Management before the subpoena is requested.

11772.1 *Application for Subpoena:* Application for a subpoena made prior to the hearing (whether by a Board agent or by other parties) should be made to the Regional Director; one made at the hearing should be made to the administrative law judge or hearing officer, as the case may be, and may be made ex parte. The Rules and Regulations call only for a written application for subpoenas; neither the name of the witness nor the description of the documents need be included.

For supervisory purposes, a Regional Director may require staff members to notify him/her of the name of any person whose testimony is being sought and the description of any documents whose production is being sought, and to explain the necessity therefor.

11772.2 *Issuance by Regional Director:* Where prehearing application has been made of the Regional Director, he/she issues the requested trial or hearing subpoena.

11774 *Persons Subpoenaed:* All witnesses the trial attorney expects to use at the hearing should be subpoenaed. Exceptions may be made where the witness has a definite personal interest or stake; e.g., a charging party, an 8(a)(3), or an 8(b)(2).

Where Board personnel are subpoenaed, see *Subpoenas of and Testimony by Board Personnel*, sections 11820–11828.

11776 *Subpoenas Duces Tecum:* A subpoena duces tecum should be drafted as narrowly and specifically as is consistent with the ends sought. It is desirable that the use of the word "all" in the description of records be avoided wherever possible. For example, the phrase "the corporate records showing total purchases" might be substituted for the phrase "all books, records, documents, and other writings that will show total purchases." In all but the exceptional case, it is advisable to provide, *in the body of the subpoena*, for alternatives in lieu of physical production; e.g., that the party against whom the subpoena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board agents for the purpose of checking the accuracy of the statement.

In the case of a corporation or partnership, where the identity of the person who has legal custody of the records desired is known and where the same person is the one whose "explanatory" testimony is necessary, the subpoena duces tecum should be addressed to him/her. Where the legal custodian and/or person who can explain the records is unknown, a subpoena duces tecum should be addressed to the corporation, the style under which partnership operates, or one of the partners; and a subpoena ad testificandum should be served on a person who is known or believed to be familiar with the records.

11778 *Service:* Subpoenas may be served personally, by certified mail, by telegraph, or by delivery at the principal office or business address of the person required to be served. (See Sec. 11(4) of the Act.) A copy of the subpoena shall also be served on any attorney or other representative of the party or witness who has entered a written appearance in the proceeding on behalf of the party or witness. If a party or witness is represented by more than one attorney or representative, service on any one of such persons in addition to the party or witness shall satisfy this requirement. See section 10340.

Although no particular period of notice is prescribed, the witness should be served sufficiently in advance of the time when he/she is to appear to enable witness to make necessary arrangements for appearance but, at any rate, in sufficient time to allow him/her 5 days to petition to revoke said subpoena if the witness so desires. Thus, enforcement proceedings, noting therein the failure to file a petition to revoke, may be instituted more promptly. Form NLRB-4685, Notification of Change of Address, may be enclosed with the subpoena.

Claim form for payment of fees and mileage should be enclosed with the subpoena when it is mailed, or given to the witness if the subpoena is hand delivered.

There is no obligation on the part of the General Counsel (as opposed to outside parties) to tender witness fees at the time of service. In cases of need or emergency—but this is to be discouraged—travel accommodations, purchased by travel request, may be furnished in advance (GTR number must be reported on the witness claim).

11780 *Witness Fees:* Witnesses subpoenaed by the General Counsel should be advised that they are entitled to appearance fees and travel expenses, if they make the appropriate claim. Witnesses are paid $30 for each day in which they are required to appear, and are also reimbursed for travel, lodging, and meal expenses. Since the amounts and terms of these reimbursements may vary from time to time, it will be necessary for the trial attorney to refer to the latest Administrative Policy Circular or G.C. memoranda in order to ascertain current terms and rates for reimbursement.

Where a respondent subpoenas employee witnesses, one should attempt to ascertain if those witnesses who appeared were tendered fees and travel expenses. If it comes to the agent's attention that a respondent refuses to pay appropriate witness fees, its action should be viewed as a violation of Section 8(a)(4) and (1) and an appropriate complaint should issue if a charge is filed. *Howard Mfg. Co.*, 231 NLRB 731 (1977).

Those expected to make a claim should be cautioned to make such claim to the trial attorney promptly on discharge under the subpoena. Claim forms should be prepared in advance for every witness subpoenaed. The form should be completed at the hearing for any witness who wishes to make a claim, and he/she should sign the claim on discharge. Approval of a witness fee claim is made by the trial attorney.

Although witnesses called by an employer or union are often compensated *for time lost* from their jobs while appearing and testifying, there is no like compensation paid by the Government.

11782 *Petition to Revoke:* If a subpoenaed person does not intend to comply with the subpoena, he/she may, within 5 days, file a petition to revoke.

Petitions to revoke are available both for subpoenas ad testificandum and for subpoenas duces tecum.

Moreover, they may be based on the ground that the evidence the production of which is being required does not relate to any matter under investigation, that the subpoena under attack does not describe with sufficient particularity the evidence the production of which is required, *or if for any other reason sufficient in law the subpoena is otherwise invalid.*

11782.1 *Petition Filed Prior to Hearing:* A petition filed prior to a hearing is filed with the Regional Director. If the subpoena under attack is an *investigative subpoena* in a C case, the Regional Director should refer it to the Board for ruling; if it is a *hearing subpoena in a C case*, the petition should be referred to the administrative law judge and with a copy of the subpoena attached. If it is either an investigative or hearing subpoena *in an R case,* the Regional Director may rule on it or refer it to the hearing officer.

11782.2 *Petition Filed at Hearing:* If the petition to revoke is filed *at* a hearing, it should be filed with and ruled on by the administrative law judge or hearing officer, as the case may be.

11782.3 *Notice of Filing:* Notice of the filing of the petition to revoke (which need not have been served on all parties) should promptly be given by the Regional Director, administrative law judge, or hearing officer, as the case may be, to the party at whose request the subpoena was issued.

11782.4 *Five-Day Period:* A problem arises when a subpoena duces tecum, served shortly before or during a hearing, is returnable forthwith or otherwise short of the 5 days from service allowed for a petition to revoke pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules. Is the person served entitled to a continuance for the remainder of the 5-day period merely on signifying that he/she intends to file a petition to revoke? It may, of course, be argued, in rebuttal (if it is true), that no prejudice could result by making the person file or testify even though the time had not expired, absent a showing of grounds for revocation. The court decision in *NLRB v. Strickland,* 220 F.Supp. 661 (D.C.W. Tenn., 1962), affd. 321 F.2d 811 (6th Cir. 1963), is authority for viewing the 5-day period as a maximum and not a minimum insofar as subpoenas ad testificandum are concerned, but that issue as regards subpoenas duces tecum has not been judicially resolved with finality and administrative law judges have not been definitive. As earlier indicated, wherever possible, service should be made at least 5 days before the return date.

11782.5 *Not a Part of the Record:* Actions and documents in connection with petitions to revoke, including rulings, do not go into the record unless the aggrieved person specifically requests it.

11790–11806 *Enforcement of Subpoena*

11790 *General:* A decision to issue a subpoena carries with it prima facie authority to enforce; and, normally, clearance to enforce will not be necessary. Where, however, there have been intervening circumstances (between decision to issue and necessity of enforcement) that create enforcement problems, the matter of enforcement should be referred to the Division of Operations Management for clearance, and consultation with Division of Enforcement Litigation to determine whether novel legal issues may be involved (sec. 11790.4). Example: Where novel contentions were made in an unsuccessful petition to revoke.

Where intervening circumstances have made enforcement unnecessary as a practical matter (e.g., where an election can be or has been conducted on an "affidavit" basis in the absence of compliance with a subpoena calling for a list of eligible voters), enforcement proceedings should not be instituted.

11790.1 *Enforcement of Subpoena Issued at Request of Private Parties:* Section 11(2) of the Act provides that subpoena enforcement proceedings must be instituted "upon application by the Board." The Rules and Regulations provides that proceedings for enforcement of subpoenas issued at the request of a private party shall be instituted by the General Counsel in the name of the Board "on relation of such private party" but only if, in the Board's judgment, the enforcement of such subpoena *would be consistent with law and with the policies of the Act.*

Examples of questions falling in this category are subpoenas of Board personnel or documents and cases where Board processes are being abused. Requests should not be *denied* without Washington clearance; doubtful cases should be submitted; the proceeding may be instituted forthwith otherwise.

The Regional Office shall institute subpoena proceedings and keep the Division of Operations Management informed if unusual circumstances arise.

11790.2 *Enforcement of Subpoena Issued at Request of the General Counsel:* Enforcement proceedings with respect to subpoenas re-

best copy available

quested by the General Counsel are handled by the Regional Office involved (secs. 11751.4b and 11754.2g).

11790.3 *Papers and Pleadings to Washington; Enforcement Proceedings:* The Region should forward to the Division of Operations Management, on an up-to-date basis, the following documents or information:

a. Conformed copy of Board's application and court's show-cause rule

b. Copies of respondent's answer and motions, if any

c. Copies of briefs or memorandums filed by Board or respondent

d. Court action after argument on rule

e. Copies of court decision and order

f. Further information bearing on the proceeding.

11790.4 *Appeal Proceedings:* Appeal proceedings will be handled by the Division of Enforcement Litigation. For that reason, special problems arising during enforcement that may create problems in the appeal should be referred to the Assistant General Counsel, Special Litigation, Appellate Court Branch.

11792 *Procedure:* It must be kept in mind that certain U.S. district courts follow practices peculiar to their own local setting. For example, the Southern District of New York, as possibly the other Federal courts in New York State, follows the code practice in the courts of that State of requiring applications for orders to show cause, which are presented ex parte, to recite that no prior application has been made for the relief requested. Other district courts may also have requirements peculiar to their locale. In preparing papers, keep that factor in mind and check with the clerk of the court for conformity of proposed application with the particular procedural requirements of that court.

Under Rule 11 of the Federal Rules, "verification" is not required when the petition is signed by counsel, unless the verification is otherwise required by statute or rule. While it is likely that all district courts follow the Federal Rules, it is well to check the local rules of the district court in which the proceeding is brought to determine whether the petition need be verified.

11792.1 *Patterns Provided:* Four pattern forms suited for general use in subpoena enforcement proceedings are provided:

Pattern 51	Rule to show cause (sec. 11806.1)
Pattern 52	Application for order requiring obedience to subpoena duces tecum (see sec. 11802.1)
Pattern 53	Application for order requiring obedience to subpoena ad testificandum (see sec. 11800.1)
Pattern 54	Notice of institution of proceeding to compel obedience to subpoena ad testificandum (see sec. 11804.1)

11792.2 *Service by Registered Mail:* For language setting out service of subpoena by registered mail, see paragraph e of pattern 52.

11792.3 *Personal Service:* For language setting out personal service, see paragraph d of pattern 53.

11792.4 *Revocation:* Paragraph f of pattern 52 sets out the statutory procedure for administrative revocation of the subpoena, and alleges that the respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the materiality of the evidence requested. Such a contention was sustained in *NLRB v. Brown & Root* (D.C. Tex., unreported, decided May 19, 1949); see also *NLRB v. Brown*, 5 LC ¶ 60,986 (D.C. Ala. 1942).

11792.5 *Motion to Quash:* If the respondent did move to quash the subpoena and the motion was denied, use paragraph e of pattern 53. Paragraph f of pattern 52 alleges that the respondent did not appear in answer to the subpoena.

11792.6 *Refusal to Testify:* If the respondent did appear at the hearing but refused to testify or produce the required records, see paragraph f of pattern 53.

11794 *Jurisdiction*

11794.1 *Jurisdiction of Board to Issue Subpoenas:* Section 11(1) of the Act grants statutory authority to the Board for exercise of subpoena power, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear (see S. R. No. 573, 74th Cong., 1st Session; sec. 6(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c)) and the courts have long upheld the power of administrative agencies to issue subpoenas (see *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)).

11794.2 *Jurisdiction of Courts to Enforce Subpoenas:* The district courts receive their power to order enforcement of subpoenas issued by the Board by virtue of Section 11(2) of the Act. The granting of such power has been approved and exercised repeatedly by the courts. The Administrative Procedure Act, section 6(c), 5 U.S.C. § 556(c), has affirmed the courts' jurisdiction in this respect.

11794.3 *Collateral Proceedings:* The respondent's denial that it is engaged in interstate commerce and therefore not subject to the Board's jurisdiction does not give it the right to have that issue determined by the court in a subpoena enforcement proceeding. See also *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941), where the court upheld the Board's right to enforcement of a precomplaint subpoena calling for commerce data. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1894); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *President v. Skeen*, 118 F.2d 58 (5th Cir. 1941); *Walling v. Benson*, 137 F.2d 501 (8th Cir. 1943); *NLRB v. Northern Trust Co.*, 56 F.Supp. 335 (D.C. Ill. 1944), affd. 148 F.2d 24 (7th Cir. 1945). The Board has exclusive power to make the initial determination of its jurisdiction in any case pending before it. *American National Bank*, supra; *Oklahoma Press Pub. Co.*, supra. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), where Bethlehem sought to attack the Board's jurisdiction in an injunction proceeding. The Administrative Procedure Act has not changed this rule. (See sec. 6(c), 5 U.S.C. § 556(c).)

11796 *Relevance:* The testimony or documentary evidence sought to be adduced by enforcement of a subpoena must be relevant to the matter under investigation or in question before the Board. This requirement is usually satisfied by an allegation showing the relevancy of the evidence sought with reference to the petition or charge, or complaint or notice of hearing, which is attached to the application as an exhibit. *Oklahoma Press Publishing Co.*, supra, 214–215.

11798 *"Fishing Expedition" as a Defense:* It can well be anticipated that the respondents will contend in many instances where enforcement of a subpoena duces tecum is sought that the Board is seeking to engage in a "fishing expedition." Obviously, the answer to such a contention is found in the careful draftsmanship of the subpoena. Books, records, etc., required to be produced, should be described with certainty and particularity both with reference to content and time period. The *Oklahoma Press* decision of the Supreme Court is especially illuminating on this problem. In that decision all of the important "fishing expedition" cases, including *Hale v. Henkel*, 201 U.S. 43 (1906); *F.T.C. v. American Tobacco Co.*, 264 U.S. 298 (1924), and *Brown v. U.S.*, 276 U.S. 134 (1928), are carefully discussed and analyzed, and many earlier misconceptions as to the state of the law cleared up. Little can be added to the opinion of the court on the subject, and all attorneys should be thoroughly familiar with the discussion and analysis, particularly *Oklahoma Press Publishing Co.*, supra, 202, 214.

11800 *Pattern 53, Application for Order Requiring Obedience to Subpoena ad Testificandum:* The caption on this form shows that the proceeding is brought in the name of the Board, but on relation of the party who requested the subpoena.

(If the subpoena was issued at the request of the General Counsel or his agent, see pattern 52. Whenever an ex rel. proceeding is brought, pattern 54, which is the notice to the relator or his attorney, should be used.)

The respondent here is an individual; if a corporation, see pattern 52.

11800.1 *Pattern 53*

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
__________ DIVISION

NATIONAL LABOR RELATIONS BOARD ON RELATION OF LOCAL 1, U.S.W. (Ind.)	Civil No. 13579
Applicant	Application for Order
v.	Requiring Obedience
JOHN DOE	to Subpoena ad
Respondent	Testificandum

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), hereinafter referred to as the Act, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, on relation of Local 1, USW (Ind.), respectfully applies to this honorable court, pursuant to Section 11(2) of the Act, for an order requiring John Doe to obey a certain subpoena ad testificandum, issued by the Board and duly served on him in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

a. This court has jurisdiction of the subject matter of the proceeding, and of the person of the Respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued was carried on within this judicial district [add or substitute any other criterion applicable under 11(2), such as that the Respondent resides or does business within this judicial district].

b. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (hereinafter referred to as the Rules) governing the conduct of its operations, which Rules and Regulations have been duly published in the Federal Register (24 F.R. 9095), as provided for in the Administrative Procedure Act (5 U.S.C. § 552). This court may take judicial notice of the said Rules and Regulations by virtue of 44 U.S.C. 307.

c. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding entitled "Local 1, United Squibb Workers of America (U.S.W., Ind.), and Fireworks Machinery Corp.," Case 42-CC-233, wherein there has been filed and served a charge, a complaint and notice of hearing was issued, and an answer has been filed, all in the manner and form required by law and Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules. Copies of the said charge, complaint and notice of hearing, and answer are annexed hereto and made part hereof, designated exhibits A, B, and C, respectively.

d. In relation to the proceeding described in paragraph c, above, the Board did cause to be issued, on January 2, 19__, at the written request of the relator, USW (Ind.), a subpoena ad testificandum, directed to Respondent John Doe, requiring said Respondent to appear and testify at a hearing before an administrative law judge of the Board to be held on January 7, 19__, at 1 o'clock in the afternoon in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, State of Nebraska, all in the manner and form provided for in Section 11(1) of the Act and Section 102.31(a) of the Rules. Said subpoena was duly served on Respondent John Doe by personal service on him thereof, in the manner provided for by Section 11(4) of the Act and Section 102.111 of the Rules. Copies of the subpoena and the affidavit of service thereof are attached hereto marked "exhibits D and E," respectively.

e. Pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules, said Respondent John Doe did, on January 7, 19__, file with Ringer S. Williams, the Administrative Law Judge designated by the Board to hear the case, a motion to revoke the subpoena, on certain grounds herein set forth, which motion was denied by the Administrative Law Judge by formal order issued on January 21, 19__. Copies of the motion to revoke the subpoena and the order denying the motion are annexed hereto marked "exhibits F and G," respectively.

f. Pursuant to said subpoena, Respondent John Doe did appear at the hearing before the Administrative Law Judge on January 28, 19__, and was sworn as a witness in said proceeding. Questions were propounded to him by counsel for relator U.S.W. (Ind.), which questions the Respondent refused to answer on the ground of irrelevancy and immateriality. The Administrative Law Judge, upon consideration of the purpose of the examination, ruled that the evidence sought was relevant and material to the issues in litigation before him, and directed the Respondent to answer. The Respondent refused to comply with the ruling of the Administrative Law Judge, withdrew from the witness stand, and left the hearing room. The Administrative Law Judge, ruling that the testimony of said Respondent John Doe is necessary and pertinent to a resolution of the issues pending in said unfair labor practice proceeding, adjourned the hearing to afford applicant an opportunity to institute these proceedings to compel Respondent John Doe to testify as required by law. A copy of the pertinent portion of the transcript of the hearing before the Administrative Law Judge is annexed hereto marked "exhibit H."

g. The refusal of Respondent John Doe to give testimony in obedience to the subpoena ad testificandum, as directed by the Administrative Law Judge, which testimony is relevant and material to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, which conduct has impeded and continues to impede the Board in the investigation of the matters before it, and has prevented and is preventing the Board from carrying out its duties and functions under the Act.

WHEREFORE, the applicant, National Labor Relations Board, respectfully prays:

(1) That an order to show cause issue forthwith directing the Respondent, John Doe, to appear before this court on a day certain to be fixed in said order, and that he show cause, if any there be, why an order should not issue directing him to appear before Ringer S. Williams, the Administrative Law Judge designated by the Board in Case 42–CC–233 pending before said Board, at such time and place as said Administrative Law Judge may designate, and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board;

(2) That upon the return of said order to show cause, an order issue out of this court requiring the Respondent, John Doe, to appear before said Administrative Law Judge, Ringer S. Williams, at a time and place to be fixed by said Administrative Law Judge, and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board; and

(3) That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated, Zenith City, Neb.

this________ day of March 19__.

National Labor Relations Board
By __________________________
General Counsel

____
John J. Jones
Regional Attorney
Region 42
4 Mammoth Drive
Zenith City, Neb.

11802 *Pattern 52, Application for Order Requiring Obedience to Subpoena Duces Tecum:* This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent, and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party, or where the respondent is an individual, see pattern 53 (sec. 11800.1).

11802.1 *Pattern 52*

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
______ DIVISION

NATIONAL LABOR RELATIONS BOARD	
Applicant	Civil No. 13579
v.	Application for Order
GOODWILL R. R. CO.	Requiring Obedience to
Respondent	Subpoena Duces Tecum

The National Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), hereinafter referred to as the Act, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, respectfully applies to this honorable court, pursuant to Section 11(2) of the Act, for an order requiring the Goodwill R. R. Co. to obey a certain subpoena duces tecum, issued by the Board and duly served on it in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

a. This court has jurisdiction of the subject matter of the proceeding, and of the Respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued was carried on within this judicial district, and the Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, maintaining an office for that purpose at 125 Omnibus Avenue, Zenith City.

b. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (hereinafter referred to as the Rules) governing the conduct of its operations, which Rules and Regulations have been duly published in the Federal Register (24 F.R. 9095), as provided for in the Administrative Procedure Act (5 U.S.C. § 552). This court may take judicial notice of the said Rules and Regulations by virtue of 44 U.S.C. § 307.

c. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding, *Fireworks Machinery Corp. (Local 1, United Squibb Workers of America (U.S.W. Ind.))*, Case 42–CA–233, wherein there has been filed and served a charge, a complaint and notice of hearing has issued, and an answer has been filed, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15, and 102.20 of the Board's Rules. Copies of the said charge, complaint and notice of hearing, and answer are annexed hereto and made part hereof, designated exhibits A, B, and C, respectively.

d. In relation to the proceeding described in paragraph c, above, the Board did cause to be issued, on January 2, 19__, at the written request of a representative of the General Counsel, a subpoena duces tecum, directed to the Respondent, and requiring said Respondent to appear at a hearing before an administrative law judge of the Board to be held on January 7, 19__, at 1 o'clock in the afternoon, in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, State of Nebraska, and to then and there give testimony and produce certain records and papers more fully described as follows:

> Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts, or other documents showing shipment of goods via said Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, State of Nebraska, for the calendar year 1981.

Said subpoena duces tecum was issued under the authority of, and in the manner and form provided for, in Section 11(1) of the Act and Section 102.31(a) of the Rules. A copy of the subpoena is attached hereto marked "exhibit D."

e. The subpoena described in paragraph d, above, was duly served on Respondent Goodwill R. R. Co. by addressing the original thereof and sending same by registered mail to John Doe, superintendent of the Zenith City Division of said railroad, at the offices described in paragraph a, above, and receipt thereof on January 3, 19__, has been duly acknowledged, all in the manner and form provided for in Section 11(4) of the Act and Section 102.111 of the Rules. A photostatic copy of the return post office receipt is attached hereto marked "exhibit E."

f. Although Section 11(1) of the Act and Section 102.31(b) of the Rules provide for a period of 5 days after service of a subpoena within which any person served with the same and wishing to urge any objections thereto may petition the Board to revoke the subpoena, the Respondent did not within 5 days after service of the subpoena on it or at any time thereafter file any petition to revoke the subpoena. Nevertheless, said Respondent failed to appear at said hearing on January 7, 19__, in response to said subpoena or to produce the evidence as therein called for and as required by its terms, and has at all times since failed and refused and continues to fail and refuse to produce the records and documents called for in said subpoena as described in paragraph d, above.

g. The refusal of Respondent Goodwill R. R. Co. to appear and to produce the required records in obedience to the subpoena duces tecum, which records are relevant and material to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, and by thus impeding and continuing to impede the Board in the investigation of the matters before it, the Respondent has prevented and is preventing the Board from carrying out its duties and functions under the Act.

WHEREFORE, the applicant, National Labor Relations Board, respectively prays:

(1) That an order to show cause issue forthwith directing the Respondent, Goodwill R. R. Co., to appear before this court on a day certain to be fixed in said order, and that it show cause, if any there be, why an order should not issue directing it to appear before the Administrative Law Judge designated by the Board to take evidence in Case 42-CA-233 pending before said Board, at such time and place as said Administrative Law Judge may designate, and there produce the records described in paragraph d, above, and to give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board;

(2) That upon the return of said order to show cause, an order issue out of this court requiring the Respondent, Goodwill R. R. Co., to appear before the Administrative Law Judge, at a time and place to be fixed by said Administrative Law Judge, and there produce the records described in paragraph d, above, and give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board; and

(3) That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated, Zenith City, Neb.

this ______ day of March 19__.

National Labor Relations Board
By ______________________________
General Counsel

____
John J. Jones
Regional Attorney
Region 42
4 Mammoth Drive
Zenith City, Neb.

11804 *Pattern 54, Notice of Institution of Proceeding to Compel Obedience to Subpoena ad Testificandum:* Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted "upon application of the Board." Section 102.31(d) of the Rules and Regulations provides that where the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board "but on relation of such private party." The same section further provides that "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution" of the enforcement proceedings. Pattern 54 is designed to put the relator on notice that he is primarily responsible for prosecuting the case before the court and will also serve to establish his standing in the court to participate in the proceedings. This form should be issued to the relator or his attorney in every ex rel. proceeding, and copies should be served on the respondent and filed with the court.

The filing of the application, and issuance of Pattern 54 notice, does not mean necessarily that the General Counsel will withdraw from further participation in the court proceedings. Each case must be handled on its own facts. For example, if the respondent questions the Board's jurisdiction, or its power to issue the subpoena, or the validity of the issuance, the General Counsel may wish to retain control of the trial of the case, since the issues raised go to the Board's basic authority, and an adverse decision may have an effect on other cases. On the other hand, if the respondent questions only the relevancy of the evidence sought to be adduced, the relator, who is primarily interested in obtaining such evidence, should be permitted to try the case and to prove its materiality.

11804.1 *Pattern 54*

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF
_______ DIVISION

NATIONAL LABOR
RELATIONS BOARD, ON
RELATION OF LOCAL 1,
U.S.W. (Ind.)

Applicant

v.

JOHN DOE

Respondent

Notice of Institution
of Proceeding to Compel
Obedience to Subpoena
Ad Testificandum

To: John Smith, Esquire
Address
City

Attorney for Relator

Local 1, U.S.W. (Ind.)

Sir:

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on relation of Local 1, U.S.W. (Ind.), has petitioned the court for an order enforcing obedience to a subpoena ad testificandum issued by the Board at the request of Local 1, U.S.W. (Ind.). Attached hereto are copies of the order to show cause and the application for order requiring obedience to subpoena ad testificandum, filed with the court on ____________, 19__.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended, and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board. We specifically call your attention to that portion of said Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court."

____
John J. Jones
Regional Attorney
Region 42
National Labor Relations
Board

Dated this _______ day

of _______ 19__.

11806 *Pattern 51, Rule to Show Cause:* Although this form was drawn with relation to an application for enforcement of a subpoena duces tecum, issued to a corporate respondent, it is equally applicable, with appropriate modification, in a proceeding against an individual respondent, and in a proceeding to enforce a subpoena ad testificandum.

Note that service on the respondent may be made by serving any officer or agent, and the process may be served by registered mail or in any manner provided for in the Federal Rules (see Rules 4 and 5).

11806.1 *Pattern 51*

IN THE UNITED STATES DISTRICT COURT
FOR THE ____ DISTRICT OF
______ DIVISION

NATIONAL LABOR
RELATIONS BOARD

Applicant Civil No. 13579

v. Rule to Show Cause

GOODWILL R. R. CO.

Respondent

The National Labor Relations Board, hereinafter called the Board, by its General Counsel, and by John J. Jones, its Regional Attorney for Region 42, having filed its application for an order requiring Respondent Goodwill R. R. Co. to obey and comply with a certain subpoena duces tecum duly and properly served on said Respondent as set forth in said application, and good cause appearing therefor, it is hereby

ORDERED that Respondent Goodwill R. R. Co. appear and show cause, if any there be, in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska, on the ____ day of April 19__, at 9 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order of this court should not issue directing the Respondent, Goodwill R. R. Co., to appear before a duly designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and there produce the books, papers, records, and other data described in the subpoena duces tecum served on the Respondent, and give testimony, in connection with the proceeding now pending before said Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.), and it is

FURTHER ORDERED that services on the Respondent of a copy of the order to show cause and of the application on which it is issued, be made on or before the ____ day of March 19__, by service thereof on any officer or agent of said Respondent, and that said Respondent shall file and serve its answer to the application not later than April ____, 19__. Service of a copy of this order, the application, and the Respondent's answer, in any manner provided for by the Rules of Civil Procedure for District Courts of the United States, or by registered mail, shall be deemed good and sufficient service.

/s/ D. W. Brown
United States District Court Judge

Dated, Zenith City

State of Nebraska,

this ____ day of March 19__.

11820–11828 *Subpoenas of and Testimony by Board Personnel*

11820 *General Disclosure of Documents:* Section 102.117 of the Rules and Regulations describes, generally, which of the Board documents, records, and materials are open to public inspection and which are not. Further guidance with respect to the disclosure of documents contained in the case file is contained in G.C. Memos 76-13, 79-9, and 79-87. Section 102.118 provides that no Board agent shall produce any Board documents or testify with respect to information coming to his/her attention in any court or Board hearing, whether in response to a subpoena or otherwise, without the written consent of the Board, its Chairman, or the General Counsel, whoever has supervision or control of the documents or Board agent. (However, see sec. 10663 regarding production of certain material, etc., with regard to backpay specifications.) This applies to hearings of the Board itself as well as to other proceedings. (With respect to in-hearing motions for production of pretrial statements of witnesses, see secs. 10394.7, 10398 *caveat*, and 10400.)

11822 *Steps to be Taken on Receiving Subpoena:* When a Regional Office staff member receives a subpoena, he/she should immediately:

a. Ascertain, if possible, the nature of the testimony being sought (this is unnecessary where the subpoena is a subpoena duces tecum).

b. Notify the party on whose behalf the subpoena is being served of the existence of Rule 102.118 (do not undertake to act as an agent in requesting the General Counsel's permission to testify).

c. Apprise the Division of Operations Management of the facts, so that a request for permission to testify (if submitted) can more cogently be considered, and if novel problems are involved coordinate with the Assistant General Counsel, Special Litigation, Appellate Court Branch (sec. 11828).

If authorization is not granted, a petition to revoke or motion to quash, whichever is applicable, should be filed on appropriate grounds.

If authorization to testify is granted, the Board agent will respond to the subpoena and testify. (See sec. 11826.)

11822.1 *Witness Fees and Allowances:* An employee who testifies in his/her *official capacity* in *private litigation* is required to collect the authorized witness fees and allowances for expenses of travel and forward such moneys, with covering memo and certification of service, to the Finance Section. The employee is in official duty status.

11824 *Motion to Quash/Petition to Revoke: With respect to non-Board proceedings*, a motion to quash will, in most jurisdictions, probably be an appropriate responsive pleading only to a subpoena duces tecum. In the case of a subpoena ad testificandum the Board employee may have to appear personally and decline to answer on appropriate grounds (sec. 11827).

11825 *With Respect to Board Hearings*, if time permits, a petition to revoke should be filed for either a duces tecum or ad testificandum subpoena. A supporting memorandum along the lines described above need not be filed unless requested by the administrative law judge or hearing officer. (See secs. 11782–11782.5 for details on petitions to revoke.)

11826 *With Respect to Either Type of Proceeding*, should the motion to quash or the petition to revoke be granted, there need be no further response to the subpoena. (If a petition to revoke in a Board proceeding is denied, a request for special permission to appeal to the Board should be directed to the Board.)

11827 *Appearance/Testimony/Production:* Should a motion to quash or petition to revoke be denied (and not reversed on appeal), should there have been insufficient time in which to file the motion or petition, or should a motion to quash or its equivalent not be applicable in the jurisdiction involved, the subpoenaed Board agent should, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel, make an appearance at the trial or hearing. The Board agent should take the oath and answer questions calling for his/her name and occupation. In answer to further questions, the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in the motion to quash or petition to revoke, or that would have been asserted therein had one been filed.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not coming to him/her in an official capacity, the agent should decline on the grounds on which permission was denied.

If the Board agent should nevertheless be ordered to give information or produce records, the attorney representing the Board agent should request a short postponement to enable him/her to communicate with Washington.

11828 *Instructions to Testify or Produce Records:* Should the Board agent be ordered to give information or produce records in violation of Section 102.118, the attorney representing the Board agent should request that action be held up for a short time to enable him/her to contact Washington.

The agent should communicate with the Division of Operations Management. It is anticipated that Washington, through the Division of Enforcement Litigation, will authorize institution of appropriate proceedings to test the issue, and the court or hearing officer will be so advised.

11830 *Court Costs*

11830 *Recovery of Costs in Appellate Court Litigation:* Rule 39 of the Federal Rules of Appellate Procedure permits the prevailing party in actions brought by or against the United States, or any agency or official of the United States acting in his official capacity, to recover costs incurred by him in the litigation.

Regional Office personnel should seek payment of court costs as part of their effort to obtain compliance with the other aspects of the court's mandate. Thus, in communications with the respondent's counsel, the compliance officer should emphasize that compliance with a court mandate includes payment of costs.

Copies of judgments of the courts of appeals may be obtained from the Appellate Court Branch, if not received in the course of ordinary distribution. Checks in payment of costs should be made payable to "Treasurer of the United States" and transmitted to the Finance Section.

Cases in which Regions are having difficulty obtaining the payment of costs should be referred to the Division of Enforcement Litigation. Checks in payment of costs should be made payable to the National Labor Relations Board and transmitted to the Deputy Associate General Counsel, Appellate Court Branch, Division of Enforcement Litigation.

Many respondents may attempt to "settle" court costs in the same manner in which offers are made to settle backpay claims. Since costs are payable to the United States Government and constitute a claim by the Government, Regional Offices should not accept a settlement offer of court costs. Such offers should be referred to the Division of Enforcement Litigation. Thereafter, the Regions may be called on to investigate the accuracy of claims of insolvency or inability to pay the costs and to report their findings to the division. In addition, because of the nature of some of the present unpaid court costs, Regions may be asked to investigate certain pending claims of inability to pay these costs.

The administrative closing of cases in which compliance has been achieved with the exception of payment of costs should be discussed with Enforcement Litigation. See sec. 10772.

SERVICE, FILING, AND COMMUNICATIONS

11840 *Service, Filing, and Communications with Parties*

11840 *Service of Process and Papers:* For the requirement of service generally, and the acceptable methods of service, see Sections 102.111–102.114 of the Rules and Regulations. For the requirement of service of a particular pleading or other paper consult the rule provision concerning that pleading or paper.

11840.1 *Service and Communications by Board Agents:* Charges and amended charges, complaints and notices of hearing in C cases, final orders, administrative law judges' decisions, and subpoenas must be served personally, by registered mail, by telegraph, or by leaving a copy at the principal office or place of business of the person on whom service is sought. Other process and papers may be served by certified mail.

After a copy of a charge or petition, together with the initial communication, has been served on the parties, and an attorney or other representative has entered an appearance on behalf of a party, copies of all further documents served pursuant to Section 102.111 of the Board's Rules and Regulations, with the exception of subpoenas, will be served on the attorney or representative of record in addition to the party. If a party is represented by more than one attorney or representative, service on any one of such persons in addition to the party satisfies the requirements of Section 102.111, but as a matter of courtesy, an effort should be made to serve all counsel or representatives who have entered an appearance on behalf of the party.

It should be particularly noted that copies of the following documents and communications should be sent to the party and to the attorney or representative of record:

a. Notices and orders issued in connection with unfair labor practice hearings, representation case hearings, and 10(k) hearings

b. Regional Directors' decisions, reports, and supplemental decisions

c. Dismissal letters in unfair labor practice cases and representation cases

d. Letters approving withdrawal requests of unfair labor practice charges or representation petitions

e. Closing compliance letters

f. Consent Election Agreements and Stipulations for Certification Upon Consent Election

g. Representation case certifications.

Where arrangements for an election have been agreed to by the parties with full participation by counsel or representative, notices of election should be sent directly to the parties, with copies to counsel or representative. By the same token, the letter requesting the *Excelsior* list, which accompanies a copy of the approved consent or stipulated election agreement, may be sent to the employer, copy to counsel or representative. The *Excelsior* list supplied by the employer should be sent by the Region directly to the petitioning and intervening parties involved.

In addition, copies of correspondence that confirm some previously agreed-to arrangement or appointment may be sent to the parties involved.

Compliance communications are also covered by the foregoing instructions. However, after the requirements for compliance have been worked out and the respondent has advised us of its intention to comply, the notices that may be required, whether pursuant to an administrative law judge's decision, Board order, court judgment, or settlement agreement, the request for certification of posting, and the instructions concerning details of compliance, can be sent directly to the parties with copies to counsel or representatives.

All other communications, both oral and written, should be with or through only the attorney or representative of record. However, whenever an attorney, representative, or party requests that copies of all written communications be sent to the party or has authorized that a party or person be contacted directly, such request and/or authorization should be honored.

Where special circumstances might warrant a departure from the foregoing instructions, clearance should be obtained from the Assistant

General Counsel before undertaking any direct communication with a party contrary to these instructions.

Designation of Representative as Agent for Service of Documents: See section 10040.6.

11840.2 *Service by a Party:* Where service of papers *by a party* on other parties is required, such service may be made by registered mail, by certified mail, or in any manner permissible in a civil action in the State of the hearing.

11840.3 *Date of Service and Proof:* Date of service shall be day of personal delivery or day of depositing in mail, whichever is applicable. Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service.

11840.4 *Computation of Period of Time:* Computation of time is controlled by Rule 102.111, which reads as follows:

> . . . (a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next Agency business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.
>
> (b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely: *Provided, however,* the following documents must be received on or before the close of business of the last day for filing:

(1) Charges filed pursuant to Section 10(b) of the Act (see also sec. 102.14).

(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.

(3) Objections to elections and revised tallies.

(4) Petitions to revoke subpoenas.

(5) Petitions filed pursuant to Section 9(c) of the Act.

11850 *Files*

11850 *Case Files:* The case file should reflect accurately the steps taken in and the current status of a given case. It should be so complete as to provide (1) a successor-assignee with the means whereby with a minimum of duplication, he/she may carry the case on, and (2) a supervisor with a gauge for measurement of the quality of the investigation.

11850.1 *Organization of Files:* Files should be so organized that specific material may be easily found. No special sectional breakdown is required—and the need for organization will often depend on the case and on the extent of the work already done, but a desirable breakdown would consist of sections devoted to the (1) formal (public) documents, (2) memo and correspondence, (3) affidavits and statements, and (4) other documents. (Normally, for easier finding and case reconstruction, the affidavits and statements should be arranged alphabetically, the rest chronologically.)

Normally, the working file should include but one typewritten and printed copy of each item. (Exception, where an affidavit is in longhand, the original and a typed copy should be included.) Extra copies, as may appear to be necessary, should be put into a "temporary" file.

11850.2 *File Should Contain Complete History of Case:* There should be no "gaps." Where an item inserted in the file speaks for itself, it is unnecessary to recite the surrounding facts in a memo, but where, for example, an unsuccessful interview attempt has been made, this should be memoed; in this way, the file will show the point has not been overlooked.

From time to time, if the case is long and involved, the Board agent assigned should, by memo, bring the circumstances up to date and signify further steps to be taken.

11860 *Documentary Evidence*

11860 *Documentary Evidence:* The term "documentary evidence" means any paper whether in written, printed, graphic, or other visual form, containing facts germane to the case that might be necessary to introduce at a hearing. Documentary evidence includes letters, records, charts, pictures, affidavits, and other signed statements.

All documentary evidence should be retained in the original form if possible; otherwise, such evidence should be either photostated or otherwise duplicated. Whenever possible, at least two copies should be available for use.

Unless the source and the circumstances of receipts are self-explanatory, they should be recited in a memorandum.

No marks should be made on documentary evidence. Notes, questions, remarks, or instructions should be inserted on separate sheets and not on the face of the document. This is particularly applicable to the practice that sometimes exists of writing on the document the name(s) of the person(s) in the office to whom it is to be routed; separate routing slips should be used for this purpose.

11870–11872 *Official Reporting Service*

11870 *Official Reporting Service*

11870.1 *General:* Contracts, based on competitive bids, are awarded annually for reporting the Agency's hearings. Regional Directors and officers-in-charge are notified in advance of the beginning of the fiscal year as to the selected contractor for the coming year and the rates and fees stipulated under the contract. The contractor notifies our field offices of its designated local subcontractor or agent for reporting service in each Region.

11870.2 *Notification of Hearing Schedule:* Notification of all hearing schedules must be sent to both the contractor and the local subcontractor. It is highly important that this information be issued promptly and accurately in every case. *See current contract for time limitations for notification of hearing schedules.*

11870.3 *Coordination with the Local Reporter:* Continuous coordination with the local reporter should be effected so that the number and location of hearings, either originally scheduled or rescheduled, are within the limitations of available reporters.

11870.4 *Scheduling Hearings:* Hearings should be scheduled in the Regional or Subregional Office city in every possible instance as this usually results in better delivery time of the transcript, savings in staff time and travel expense, and, under some contracts, a lower reporting rate.

11870.5 *Timely Notification of Cancellations or Postponements:* Notification of all hearings canceled or postponed must be sent to both the contractor and the local subcontractor. Telephone or telegraph notifications are sometimes necessary in order to avoid payment of a fee for a hearing that has been canceled or postponed.

Fees for hearings canceled or postponed without sufficient notice to the reporter constitute a heavy expense. All members of the staff must be alert to the problem of reporter's fees for cancellations that usually occur as a result of consent election agreements. Accordingly, sufficiently in advance of a date scheduled for hearing, every effort should have been made to ascertain if the hearing will proceed or if an agreement can be reached without assembling for the hearing. Many cancellation fees can be avoided by immediate notice to the reporter when the response indicates that no hearing will be held.

See the current contract for time limitations for notification of cancellations or postponements.

11870.6 *Cancellations or Postponements at the Hearing Site:* The official reporter supplies its local subcontractors with a form for endorsement by the hearing officer or field attorney when the reporter is present at the place of a canceled or postponed hearing. This form is the basis for billing by the reporter for the fee for canceled or postponed hearings and in most cases eliminates the necessity for further correspondence on the subject. This fee is not payable when a postponement, recess, or adjournment is ordered during the progress of the hearing. During settlement or consent negotiations at the place of scheduled hearing, the reporter should be released as soon as indications are clear that the hearing is to be canceled or postponed.

11870.7 *Sales of Copies of Transcript:* Pub. L. 92-463 requires that Federal agencies make copies of transcripts of hearings available to interested persons at actual cost of duplication. Copies of transcripts of hearings so ordered shall be provided by the contractor. Care must be exercised with respect to the use of Regional Office copies of the transcript by the parties. The transcript is part of the formal file, and as such is accessible to the public. The use of the transcript, however, should not be volunteered. When a request is received to read or hand copy the office copy, it should be made promptly available under such circumstances as will not delay Board personnel in processing the case. Loan of the transcript for use outside the office is not permitted.

11870.8 *Complaints about Reporting Service:* Complaints about reporting service should be transmitted to the Division of Administration, Facilities and Services Branch.

11870.9 *Other Contract Provisions:* Refer to the current reporting service contract for information relating to other provisions, such as:

a. Fees—attendance fees, cancellation fees (for cancellations and postponements), additional service fees

b. Delivery of transcripts and copies—ordinary copy, expedited copy, prompt copy, daily copy

c. Timely delivery of transcripts

d. Liquidated damages for delay in delivery of transcripts

e. Receipt and processing of transcripts and exhibits

f. Retention of stenographic notes and transcripts.

11872 *Report of Obligated Cost of Hearing, Form NLRB-4237:* It is the responsibility of the hearing officer in an R case and the trial attorney in a C case to complete this form immediately upon the close of the hearing or as of the last day of the month if the hearing continues into the subsequent month. Likewise, if the hearing is postponed or canceled at the hearing site, this form must be completed by the respective hearing officer or trial attorney.

A hearing that is adjourned for 5 or more calendar days is considered a complete hearing for purposes of attendance fees. Therefore, in such situations, this form must be completed and turned in to the office manager immediately upon such adjournment and a new Form NLRB-4237 completed for the reopened hearing. If the hearing officer or trial attorney is away from the Regional Office on the last day of the month, he/she should telephone or telegraph the office to advise the estimated cost of hearing through that date.

11880–11882 *Intra-Agency Communication*

11880 *Communication with Washington:* If a direct communication is received by a Regional Office from another part of the Agency, on a matter that should properly be routed through the Division of Operations Management, answers addressed to the Associate General Counsel should be sent through the Division of Operations Management, along with copies of the original communication.

In submitting other than routine material to the Division of Operations Management such material should be identified.

Each of the Assistant General Counsels in the Division of Operations Management is the focal point of contact between Washington and the Regions assigned to the Assistant General Counsel. The Assistant General Counsel is the Region's representative on all matters relating to casehandling, performance, personnel, and administration. The Assistant General Counsel participates in Washington agendas involving regional cases and assists in handling matters or problems involving the Assistant General Counsel's Regions. Telephone calls should be made directly to the Assistant General Counsel.

All case correspondence to Washington office is sent over the Regional Director's signature.

11881 *Communication with the Board:* All communications that are sent directly to the Board should be addressed to the Office of the Executive Secretary.

11882 *Communication Between Regional Offices:* In the absence of Division of Operations Management clearance to the contrary, casehandling activities of Regional Office personnel should be confined to the geographical limits of their respective Regions. (With respect to travel to points outside of, but close to, the Region, the Regional Director is expected to exercise his/her discretion in the direction of getting the job done most efficiently and economically.)

Out-of-Region interviews will be conducted by personnel from the Region in which the interview is to be conducted, on request by the Regional Director to whose office the case is assigned. Such request (which should be sufficiently detailed to serve as a basis for the requested action without the necessity of extended correspondence) should be sent directly from Regional Director to Regional Director; and the requested materials—affidavits, reports, etc.—may be directly transmitted.

With respect to potential transfer of cases, initial communication between Regional Directors may be undertaken as outlined in section 11720.1.

Regional Directors are encouraged to negotiate directly with other Regions in the district or with contiguous Regions to obtain casehandling assistance and are authorized to issue travel orders to employees who are detailed to another Regional Office subject to the following guidelines.

a. Travel orders may be written for a period not to exceed 29 days. (Periods of 30 days or more require an SF-52 and must be processed through your Assistant General Counsel. See Administrative Manual, sec. 6022.3.)

b. All travel and *per diem* expenses must be charged to the Region receiving the assistance.

c. Travel orders are to be issued by the Regional Director who provides the Board agent.

d. An original and four copies of the travel order should be prepared. This will be a supplemental travel order to the employee's annual travel order. The travel order should set forth: the employee's name; the Region; the nature of the detail, including identification of case name and number, where appropriate; the estimated cost of the detail as determined by agreement between the Regional Directors; and, the Region to be charged.

e. The travel order and copies should be distributed as follows: the original to the traveler; one copy to the Executive Assistant to the General Counsel; one copy to the assisted Region; one copy to accompany the employee's travel voucher; and one copy to be retained by the issuing Regional Office.

f. In reporting its monthly travel and per diem costs, the releasing office will enter the employee's name under its list of travelers for the month on the *Report of Obligations* and show under "items Chargeable Elsewhere," the amount of the employee's monthly travel chargeable to the other Region and the Region to be charged.

Exceptions to this authorization would be any detail of 30 days or more, or any short-term detail that would produce abnormally high travel costs.

11884 *Communication; Other Agencies*

11884 *Liaison with Other Agencies:* (For more specific guidance pertaining to OSHA matters, refer to G.C. Memos 75-29, 76-14, and 79-4. With respect to Mine Safety, see G.C. Memo 80-10. See also sec. 11751.3.) Normally, regional contacts with other agencies need not be cleared through the Division of Operations Management, except the requirement of clearance would continue when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). Similarly, the clearance requirement would continue prior to referral if alleged unethical conduct of attorneys is involved. (See secs. 10054.3 and 11754.2(a).)

The Regional Office may directly contact local within-Region offices of other agencies in order to procure information (in connection with an actual case) that is available through such offices. For example, a Regional Office may request and secure such factual information from a local unemployment compensation office or mediation service office as the latter are authorized and willing to supply.

Regional Office personnel, within the limitations of Sections 102.117 and 102.118 of the Rules and Regulations (and secs. 11820-11828 herein), should cooperate in furnishing to local offices of other Government agencies such information as may be requested by them. Out-of-Region requests should be handled through the Division of Operations Management.

With respect to possible violations of other Federal statutes, see sec. 10054.3.

11886 *Congressional Inquiries*

11886.1 *Reply by Regional Directors:* Regional Directors have the authority to respond directly to members of Congress concerning inquiries about a status of a case or questions concerning the handling of a case. Courtesy copies of such letters are forwarded to the Division of Operations Management so that Washington might be fully apprised of all matters in which congressional interest has been expressed.

11886.2 *Reply by Washington:* Congressional inquiries concerning the following matters are referred to the Division of Operations Management for consideration and response:

a. Cases may be multiregional

b. Regional or general operations casehandling procedures

c. Cases pending in Washington on advice

d. Cases of national importance or widespread interest

e. The establishment of new Regional, Subregional, or Resident Offices

f. The relocation of regional boundaries

g. A change in the status of an existing office

h. Proposed legislation with respect to changes in our Act

i. Any congressional inquiries of such a nature that a reply should be more appropriately made by the General Counsel.

15004 Alphabetical list of States showing location in relation to regions and subregions. (Note that respective region number follows subregion number to facilitate locating areas serviced.)

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15010 *Areas Served By Regional and Subregional Offices*

(State and County Coverage)

(Listed in numerical order except that subregions appear directly under respective regions.)

Region 1. Boston, Massachusetts. Services *Maine, New Hampshire, Vermont, Massachusetts,* and *Rhode Island.*

Region 2. New York, New York. In *New York,* services the boroughs of Manhattan and the Bronx in New York City; Orange, Putnam, Rockland, and Westchester Counties.

Region 3. Buffalo, New York. Services all *New York* State Counties except the New York City metropolitan area counties serviced by Regions 2 and 29.

Persons may also obtain service at the resident office located in Albany, New York.

Region 4. Philadelphia, Pennsylvania. In *Pennsylvania,* services Berks, Bradford, Bucks, Carbon, Chester, Columbia, Dauphin, Delaware, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, and Wyoming Counties; in *New Jersey,* services Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean, and Salem Counties; and in *Delaware,* services New Castle County.

Region 5. Baltimore, Maryland. Services *Maryland* and the *District of Columbia*; in *Delaware,* services Kent and Sussex Counties; in *Pennsylvania,* services Adams, Cumberland, Franklin, and York Counties; in *Virginia,* services Accomack, Albemarle, Amelia, Arlington, Augusta, Brunswick, Buckingham, Caroline, Charles City, Chesterfield, Clarke, Culpeper, Cumberland, Dinwiddie, Essex, Fairfax, Fauquier, Fluvanna, Frederick, Gloucester, Goochland, Greene, Greensville, Hanover, Henrico, Highland, Isle of Wright, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenberg, Madison, Mathews, Middlesex, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Powhatan, Prince Edward, Prince

George, Prince William, Rappahannock, Richmond, Rockingham, Shenandoah, Southampton, Spotsylvania, Stafford, Surry, Sussex, Warren, Westmoreland, and York Counties, and the independently incorporated Virginia cities, not part of, but located within or adjacent to, the territory defined by these Virginia counties; and in *West Virginia*, services Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, and Pendleton Counties.

Persons may also obtain service at the resident office located in Washington, D.C.

Region 6. Pittsburgh, Pennsylvania. In *Pennsylvania*, services Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Lawrence, McKean, Mercer, Mifflin, Potter, Somerset, Venango, Warren, Washington, and Westmoreland Counties; and in *West Virginia*, services Barbour, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Hancock, Harrison, Lewis, Marion, Marshall, Monongalia, Ohio, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel, Wirt, and Wood Counties.

Region 7. Detroit, Michigan. In *Michigan*, services Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luse, Mackinac, Macomb, Manistee, Mason, Mecoste, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, St. Clair, St. Joseph, Sanilac, Schoolcraft, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties.

Persons may also obtain service at the resident office located in Grand Rapids, Michigan.

Region 8. Cleveland, Ohio. In *Ohio*, services Allen, Ashland, Ashtabula, Auglaize, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Defiance, Delaware, Erie, Fulton, Geauga, Guernsey, Hancock, Hardin, Harrison, Henry, Holmes, Huron, Jefferson, Knox, Lake, Licking, Logan, Lorain, Lucas, Mahoning, Marion, Medina, Monroe, Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Washington, Wayne, Williams, Wood, and Wyandot Counties.

Region 9. Cincinnati, Ohio. In *Ohio*, services Adams, Athens, Brown, Butler, Champagne, Clark, Clermont, Clinton, Darke, Fairfield, Fayette, Franklin, Gallia, Greene, Hamilton, Highland, Hocking, Jackson, Lawrence, Madison, Meigs, Mercer, Miami, Montgomery, Perry, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Vinton, and Warren Counties; in *Indiana*, services Clark, Dearborn, and Floyd Counties; and in *West Virginia*, services Boone, Cabell, Clay, Fayette, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mingo, Nicholas, Putnam, Raleigh, Roane, Wayne, and Wyoming Counties; and in *Kentucky*, services Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Bullitt, Campbell, Carroll, Carter, Casey, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gellatin, Garrard, Grant, Greenup, Hardin, Harlan, Harrison, Henry, Jackson, Jefferson, Jessamine, Johnson, Kenton, Knott, Knox, Larue, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Marion, Martin, Mason, Meade, Menifee, Mercer, Montgomery, Morgan, Nelson, Nicholas, Oldham, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Spencer, Taylor, Trimble, Washington, Whitley, Wolfe, and Woodford Counties.

Region 10. Atlanta, Georgia. In *Georgia*, services Baker, Baldwin, Banks, Barrow, Bartow, Ben Hill, Berrien, Bibb, Bleckley, Bryan, Bulloch, Burke, Butts, Calhoun, Candler, Carroll, Catoosa, Chatham, Chattahoochee, Chattooga, Cherokee, Clarke, Clay, Clayton, Cobb, Colquitt, Columbia, Cook, Coweta, Crawford, Crisp, Dade, Dawson, De Kalb, Dodge, Dooly, Dougherty, Douglas, Early, Effingham, Elbert, Emanuel, Evans, Fannin, Fayette, Floyd, Forsyth, Franklin, Fulton, Gilmer, Glascock, Gordon, Greene, Gwinnett, Habersham, Hall, Hancock, Haralson, Harris, Hart, Heard, Henry, Houston, Irwin, Jackson, Jasper, Jefferson, Jenkins, Johnson, Jones, Lamar, Laurens, Lee, Liberty, Lincoln, Long, Lumpkin, McDuffie, McIntosh, Macon, Madison, Marion, Meriwether, Miller, Mitchell, Monroe, Montgomery, Morgan, Murray, Muscogee, Newton, Oconee, Oglethorpe, Paulding, Peach, Pickens, Pike, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richmond, Rockdale, Schley, Screven, Spalding, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tattnall, Taylor, Telfair, Terrell, Tift, Toombs, Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Walton, Warren, Washington, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, and Worth Counties; in *Tennessee*, services Anderson, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Loudon, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Unicoi, Union, and Washington Counties; and in *Alabama*, services Autauga, Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, De Kalb, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Madison, Marion, Marshall, Morgan, Perry, Pickens, Randolph, St. Clair, Shelby, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston Counties.

Persons may also obtain service at the resident office located in Birmingham, Alabama.

Region 11. Winston-Salem, North Carolina. Services *North Carolina* and *South Carolina*. In *Tennessee*, services the city of Bristol in Sullivan County; in *Virginia*, services Alleghany, Amherst, Appomattox, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Charlotte, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Halifax, Henry, Lee, Mecklenburg, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise and Wythe Counties, and the independently incorporated Virginia cities, not part of, but located within or adjacent to the territory defined by these Virginia counties; in *West Virginia*, services Greenbriar, Mercer, Monroe, and Summers Counties.

Region 12. Tampa, Florida. In *Florida*, services Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dade, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla Counties; and in *Georgia*, services Appling, Atkinson, Bacon, Brantley, Brooks, Camden, Charlton, Clinch, Coffee, Davis, Decatur, Echols, Glynn, Grady, Jeff, Lanier, Lowndes, Pierce, Seminole, Thomas, Ware, and Wayne Counties.

shiek, Woodbury, Worth, and Wright Counties; in *Wisconsin*, services Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Claire, Iron, Jackson, Pepin, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, and Washburn Counties.

Persons may also obtain service at the resident office located in Des Moines, Iowa.

Region 19. Seattle, Washington. Services *Alaska, Montana, Idaho,* and all counties in *Washington* except Clark. In *Idaho*, services Adams, Benewah, Bonner, Boundary, Clark, Clearwater, Custer, Fremont, Idaho, Kootenai, Latah, Lemhi, Lewis, Nex Perce, Shoshone, and Valley Counties; and in *Montana*, services Beverhead, Broadwater, Cascade, Deer, Lodge, Flathead, Gallatin, Glacier, Granite, Jefferson, Lake, Lewis and Clark, Liberty, Lincoln, Madison, Meagher, Mineral, Missoula, Pondera, Powell, Revalli, Sanders, Silver Bow, Teton, and Toole Counties.

Subregion 36. Portland, Oregon. Services *Oregon*. In *Washington*, services Clark County.

Persons may also obtain service at the resident office located in Anchorage, Alaska.

Region 20. San Francisco, California. In *California*, services Butte, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Mateo, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Yolo, and Yuba Counties.

Subregion 37. Honolulu, Hawaii. Services *Hawaii*.

Region 21. Los Angeles, California. In *California*, services Imperial, Orange, Riverside, and San Diego, and that portion of Los Angeles County lying east of Harbor Freeway and Gaffey Street, south and east of Pasadena Freeway and Arroyo Parkway, and south of Foothill Freeway and Baseline Road (State Route 30).

Persons may also obtain service at the resident office located in San Diego, California.

Region 22. Newark, New Jersey. In *New Jersey,* services Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren Counties.

Region 24. Hato Rey, Puerto Rico. Services *Puerto Rico* and the *U.S. Virgin Islands.*

Region 25. Indianapolis, Indiana. Services *Indiana,* with the exception of Lake, Clark, Dearborn, and Floyd Counties; in *Kentucky,* services Daviess and Henderson Counties.

Region 26. Memphis, Tennessee. Services all of *Arkansas* except for Miller County. In *Tennessee,* services Bedford, Benton, Bledsoe, Cannon, Carroll, Cheatham, Chester, Clay, Coffee, Crockett, Davidson, Decatur, De Kalb, Dickson, Dyer, Fayette, Fentress, Franklin, Gibson, Giles, Grundy, Hardeman, Hardin, Haywood, Henderson, Henry, Hickman, Houston, Humphreys, Jackson, Lake, Lauderdale, Lawrence, Lewis, Lincoln, Marion, McNairy, Macon, Madison, Marshall, Maury, Montgomery, Moore, Obion, Overton, Perry, Pickett, Putnam, Robertson, Rutherford, Sequatchie, Shelby, Smith, Stewart, Sumner, Tipton, Trousdale, Van Buren, Warren, Wayne, Weakley, White, Williamson, Wilson Counties; in *Mississippi,* services Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, De Soto, Grenada, Holmes, Humphreys, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Noxubee, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster, Winston, and Yalobusha Counties; and in *Kentucky,* services Adair, Allen, Ballard, Barren, Breckenridge, Butler, Caldwell, Calloway, Carlisle, Christian, Clinton, Crittendon, Cumberland, Edmondson, Fulton, Graves, Grayson, Green, Hancock, Hart, Hickman, Hopkins, Livingston, Logan, Lyon, Marshall, McCracken, McLean, Metcalfe, Monroe, Muhlenberg, Ohio, Russell, Simpson, Todd, Trigg, Union, Warren, Wayne, and Webster Counties.

Persons may also obtain service at the resident offices located in Little Rock, Arkansas, and in Nashville, Tennessee.

Region 27. Denver, Colorado. Services *Wyoming, Colorado,* and *Utah.* In *Nebraska,* services Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux Counties; in *Idaho,* services Ada, Bannock, Bear Lake, Bingham, Blaine, Boise, Bonneville, Butte, Camas, Canyon, Caribou, Cassia, Elmore, Franklin, Gem, Gooding, Jefferson, Jerome, Lincoln, Madison, Minidoka, Oneida, Owyhee, Payette, Power, Teton, Twin Falls, and Washington Counties; and in *Montana*, services Big Horn, Blaine, Gargon, Carte, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Gold Valley, Hill, Judith Basin, McCone, Musselshell, Park, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Stillwater, Sweetgrass, Treasure, Valley, Wheatland, Wibaux, and Yellowstone Counties.

Region 28. Phoenix, Arizona. Services *Arizona* and *New Mexico*. In *Texas*, services Culberson, El Paso, and Hudspeth Counties; and in *Nevada*, services Nye, Lincoln, and Clark Counties.

Persons may also obtain service at the resident offices located in Albuquerque, New Mexico; El Paso, Texas; and Las Vegas, Nevada.

Region 29. Brooklyn, New York. In *New York*, services the borough of Queens.

Region 30. Milwaukee, Wisconsin. In *Wisconsin*, services Adams, Brown, Calumet, Columbia, Crawford, Dane, Dodge, Door, Florence, Fond du Lac, Forest, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Milwaukee, Monroe, Oconto, Oneida, Outagamie, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Shawano, Sheboygan, Vernon, Vilas, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago, and Wood Counties; in *Michigan*, services Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee, Ontonagon Counties.

Region 31. Los Angeles, California. In *California*, services Inyo, Kern, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties that portion of Los Angeles County lying west of Harbor Freeway and Gaffey Street, north and west of Pasadena Freeway and Arroyo Parkway, and north of Foothill Freeway and Baseline Road (State Route 30).

Region 32. Oakland, California. In *California*, services Alameda, Alpine, Amador, Calaveras, Contra Costa, El Dorado, Fresno, Kings, Madera, Mariposa, Merced, Mono, Monterey, San Benito, San Joaquin, Santa Clara, Santa Cruz, Stanislaus, Tulare, Tuolumne Counties; and in *Nevada*, services Churchill, Douglas, Elko, Esmeralda, Eureka, Humboldt, Lander, Lyon, Mineral, Ormsby, Pershing, Storey, Washoe, and White Pine Counties.

Region 33. Peoria, Illinois. In *Illinois*, services Boone, Bureau, Carroll, Cass, Champaign, De Kalb, De Witt, Douglas, Ford, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Jo Daviess, Kankakee, Kendall, Knox, La Salle, Lee, Livingston, Logan, Macon, Marshall, Mason, McDonough, McHenry, McLean, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Schuyler, Stark, Stephenson, Tazewell, Vermilion, Warren, Whiteside, Winnebago, and Woodford Counties; and in *Iowa*, services Clinton, Des Moines, Dubuque, Jackson, Lee, Louisa, Muscatine, and Scott Counties.

Region 34. Hartford, Connecticut. Services *Connecticut.*

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